A

DIGEST

OF THE

LAW OF EVIDENCE

ON THE TRIAL OF

Actions at Nisi Prius.

BY HENRY ROSCOE, ESQ.

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

FOURTH EDITION,

WITH CONSIDERABLE ADDITIONS.

LONDON:

SAUNDERS AND BENNING, LAW BOOKSELLERS,

(SUCCESSORS TO J. BUTTERWORTH AND SON,)

43, FLEET STREET.

1836.

LONDON:

PRINTED BY RAYNER AND HODGES,

15, Shoe Lane, Fleet Street.

THE present edition, which includes the decisions upon evidence as affected by the New Rules of Pleading, is entirely the Work of the late Mr. ROSCOE, who lived to superintend the Publication, with the exception of the revision of the proofs of the Index.

Temple, 15th June, 1836.

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In forming a digest of the *general rules* of evidence, the subject may be considered, first, with regard to the *nature* of evidence; secondly, with regard to the *object* of evidence; thirdly, with regard to the *instruments* of evidence; and, fourthly, with regard to the *effect* of evidence.

With regard to its *nature*, evidence may be considered under the following heads.—Primary or secondary evidence; presumptive evidence; hearsay; admissions.

PRIMARY EVIDENCE.

It is a general rule, that the best evidence must be given that the nature of the case admits. *B. N. P.* 293. Thus, where a will of lands is to be proved, the primary evidence of it is the will itself, and neither an exemplification of it, nor the probate is admissible. *Id.* 246, *post.* So in general where a contract has been reduced into writing, and been signed by the parties, the writing is the best evidence of it, and must be produced. *Vide post*, p. 8. But it is not in every case necessary, where the matter to be proved has been committed to writing, that the writing should be produced. If the narrative of a fact to be proved, has been committed to writing, it may yet be proved by parol evidence. Upon this principle, a receipt for money will not exclude parol evidence of the payment. *Rambert v. Cohen*, 4 *Esp.* 213, *post.* So where, in trover, to prove the demand, the witness stated that he had verbally required the defendant to deliver up the property, and at the same time served upon him a notice in writing to the same effect, Lord Ellenborough ruled that it was not necessary that the writing should be produced. *Smith v. Young*, 1 *Campb.* 439. In the same manner what a party says, admitting a debt, is evidence, notwithstanding the promise to pay is reduced into writing. *Singleton v. Barrett*, 2 *C. and J.* 369. So where the fact to be proved was, that certain persons stood in the relation of landlord and tenant, it was held that although there was a written contract, the fact of the tenancy might be proved by parol. *R. v. Inhab. of Holy Trinity*, 7 *B. and C.* 611, *post*, p. 16. So, although there exists a deed of partnership, yet the fact of partnership may be proved by the acts of the parties. *Vide post*, p. 16. But, when in order to prove a partnership between *Didot* and *Foudrinier*, whose assignees

were parties to the suit, a witness was asked, whether he had not heard Foudrinier say, that by a deed between him and Didot, an interest belonged to Didot, Abbott C. J. was clearly of opinion that no question could be asked as to what Foudrinier had said, of the contents of a writteh instrument, without the production of the instrument, or an account of its non-production. *Bloxam v. Elsie, R. and M.* 187. *Sed vide post*, p. 36. Where it is necessary to prove the fact of a marriage, the entry in the parish register is not superior evidence, but the fact may be proved by the testimony of persons who were present, and witnessed the ceremony, or by general reputation. *Evans v. Morgan*, 2 *C. and J.* 453. *Vide post.* So the inscriptions and devices on banners displayed at a public meeting may be proved by parol, and it is not necessary to produce the banners themselves. *R. v. Hunt*, 3 *B. and A.* 566. So the transactions and proceedings of public meetings may be proved by parol, as in the case of resolutions entered into, although it should appear that those resolutions were read from a written or printed paper. *Id.* 568.

The primary evidence of all judicial proceedings, is the production of the proceedings themselves, or of examined copies of them. *Vide post.* Thus parol evidence is not admissible of the day on which a cause came on to be tried, as it is capable of proof by matter of record. *Thomas v. Ansley*, 6 *Esp.* 80. *R. v. Page*, *Id.* 83. And where, to prove that the plaintiff had been discharged under the insolvent act, it was proposed to give in evidence his admission to that effect, Lord Ellenborough held it insufficient, and said that to prove a judicial act of this sort, it was necessary to call the clerk of the peace, and to give in evidence the order of the Court of Quarter Sessions by which the discharge was effected. *Scott v. Clare*, 3 *Campb.* 236. So parol evidence is not admissible to prove the taking of oaths required by the Toleration Act, as it will appear by the records of the Court where the oaths were taken. *R. v. Hube, Peake, N. P. C.* 131.

The counterpart of a deed is not secondary evidence, but is admissible as original evidence against the party executing it and those claiming under him; *Burleigh v. Stibbs*, 4 *T. R.* 465; *Roe v. Davis*, 7 *East*, 363; and he will not be permitted to object that the original was not properly stamped. *Paul v. Meek*, 2 *Y. and J.* 116.

SECONDARY EVIDENCE.

It is a general rule, as already stated, that the best evidence must be given of which the nature of the case is capable. *B. N. P.* 293. Secondary evidence therefore is inadmissible, unless some ground be previously laid for its introduction by showing the impossibility of procuring better evidence.

What ground must be laid for the introduction of secondary evidence.] Before secondary evidence can be admitted, it must be proved that better evidence cannot be obtained. Thus in the case of a lost deed, after proof of its due execution, *R. v. Culpepper, Skin.* 673, the loss of the deed must be proved, and if two or more parts have been executed, the loss or destruction of all the parts should, it seems, be proved before other evidence can be received. *B. N. P.* 254. See *Doxon v. Haigh*, 1 *Esp.* 409. Where the instrument is in the possession of the opposite party, parol evidence of its contents cannot be given, without proof of the service of a notice to produce it. *See post*, p. 4. All the proper sources from which the primary evidence can be procured must be exhausted, before secondary evidence can be admitted. Thus the party who has the legal custody of an instrument must be applied to before parol evidence can be received. *R. v. Stoke Golding*, 1 *B. and A.* 173. So where a letter, which had been in the possession of the defendant, was filed in the Court of Chancery, pursuant to an order of that court, it was ruled, that secondary evidence of it was not admissible, it being in the power of either party to produce it, on application to the court. *Williams v. Munnings*, *R. and M.* 18. Where a document is in the hands of an attorney who is called to produce it, but declines to do so, relying upon his privilege, secondary evidence of its contents may be given. *Marston v. Downes*, 6 *C. and P.* 381.

Where secondary evidence is offered, in consequence of the loss of the primary evidence, it must be shown, in order to establish the loss, that diligent search has been made in those quarters from which the primary evidence was likely to be procured. Where the publisher of a paper, in which a libel had appeared, stated, that he believed the original was either destroyed or lost, having been thrown aside as useless, this was held sufficient to let in secondary evidence. *R. v. Johnson*, 7 *East*, 66. So where a licence to trade had been returned to the secretary of the governor who had granted it, and the secretary swore that it was his custom to destroy or put aside such licences amongst the waste papers of his office as of no further use, and that he supposed he had disposed of the licence in question in the same manner as other licences; and that he had searched for it but did not recollect whether he had found it or not, though he did not think he had found it, the court held the loss sufficiently proved. *Kensington v. Inglis*, 8 *East*, 278. So where it became necessary to account for the non-production of a policy, and it was proved that it had been effected about seven years before, and having become useless on account of a second policy being effected, it had probably been returned to the plaintiff; and the clerk of the plaintiff's attorney, a few days before the trial of the action, searched for

it in the plaintiff's house, not only in every place pointed out by the plaintiff, but in every place which he thought likely to contain a paper of this description, the search was held to be sufficient. *Brewster v. Sewell*, 3 *B. and A.* 296. So in a settlement case, where it was proved, that one part only of an indenture had been executed, that the pauper and master were both dead at the time of trial, and that an inquiry for it had been made of the pauper shortly before his death, who said, that the indenture had been given up to him after the expiration of the apprenticeship, and that he had burnt it, and that an inquiry had also been made of the daughter and sole executrix of the master, who said she knew nothing about it, it was held that a sufficient inquiry had been made to render parol evidence of the contents admissible. *R. v. Morton*, 4 *M. and S.* 48. *See R. v. Piddlehinton*, 3 *B. and Ad.* 460. But where it did not appear that the indenture had been in the possession of the pauper, whose declarations as to its loss were offered in evidence, they were held inadmissible. *R. v. Rawden*, 4 *Nev. and M.* 97. And where the party, in whose possession the instrument was, is alive, he must be called, and his declarations are not admissible. *R. v. Denio*, 7 *B. and C.* 620. *Parkins v. Cobbett*, 1 *C. and P.* 282. Thus where, in another settlement case, it appeared, that there were two parts of an indenture, one of which had been destroyed, and the other delivered to Miss T. to whom the pauper had been assigned, and that application had been made to Miss T. (who was not called) who said she could not find the indenture, and did not know where it was, the search was held to be insufficient. *R. v. Castleton*, 6 *T. R.* 236, and see *Williams v. Younghusband*, 1 *Stark.* 139. Where the loss or destruction of the paper may almost be presumed, very slight evidence of its loss or destruction is sufficient. *Per Abbott, C. J., Brewster v. Sewell*, 3 *B. and A.* 296. Thus where depositions have been delivered to the clerk of the peace or his deputy, it appearing that on the bill being thrown out the practice is to throw away the depositions as useless, slight evidence of a search for them is sufficient, and the deputy need not be called, it being his duty to deliver them to his principal. *Freeman v. Arkell*, 2 *B. and C.* 496. The degree of diligence to be used in searching for a deed must depend on the importance of the deed, and the particular circumstances of the case. *Per Cur. Gully v. Bp. of Exeter*, 4 *Bingh.* 298. The presumption is that a useless instrument would be destroyed. *Per Bayley, J., R. v. East Fairley*, 6 *D. and R.* 153. Where it was the duty of the party in possession of a document to deposit it in a particular place, and it is not found in that place, the presumption is that it is lost or destroyed. *R. v. Stourbridge*, 8 *B. and C.* 96, 2 *M. and R.* 43, *S. C.* So where a will is not forthcoming, if it was in the custody and

power of the testator, or rather, unless it appears that it was not in his custody or power, the presumption of law is, that it was destroyed by him. *Wargent v. Hollings*, 4 *Hagg. Eccl. R.* 249.

Notice to produce, when necessary.] In general, when any written instrument is in the possession of the opposite party, secondary evidence of its contents is inadmissible, without previous proof of a notice to produce the original. But where, from the nature of the proceedings, the party in possession of the instrument has notice that he is to be charged with the possession of it, as in the case of trover for a bond, a notice to produce is unnecessary. *How v. Hall*, 14 *East*, 274. *Scott v. Jones*, 4 *Taunt.* 865. *Colling v. Treweek*, 6 *B. and C.* 398. And the plaintiff may prove the nature and description of the document by secondary evidence though the defendant offers to produce it. *Whitehead v. Scott*, 2 *Moo. and R.* 2. So a notice is not required where the party has procured the possession of the instrument by fraud, as where he has received it, after the commencement of the action, from a witness called for the purpose of producing it under a *subpœna duces tecum*. *Leeds v. Cook*, 4 *Esp.* 256. A counterpart may be read without a notice to produce the original. *Burleigh v. Stibbs*, 5 *T. R.* 465. *Roe v. Davis*, 7 *East*, 363, *ante*, p. 2. In an action for seaman's wages, secondary evidence of the ship's articles is admissible under stat. 2 G. 2, c. 36, s. 8, without a notice to produce them. *Bowman v. Manzleman*, 2 *Campb.* 315. Notice to produce a notice is not requisite. *Kine v. Beaumont*, 3 *B. and B.* 288. *Colling v. Treweek*, 6 *B. and C.* 398. Neither party will be allowed, either in an examination in chief, or in a cross-examination, to inquire into the contents of a deed, merely because the opposite party has the original deed in his possession, in court, at the time of the trial, and the opposite party may object to parol evidence of the contents on account of his not having received a notice to produce the original. *Cook v. Hearn*, 1 *Moo. and Rob.* 101. 1 *Phill. Ev.* 425. 1 *Stark. Ev.* 362. *See also Doe v. Grey*, 1 *Stark.* 283. *Doe v. Harvey*, 4 *Burr.* 2484. In ejectment by an heir at law, the defendant relied upon a will. On the cross-examination of one of his witnesses he stated, that about a fortnight after the execution of the first will, a second will was prepared, which had come to the possession of the defendant. The plaintiff's counsel was not allowed to ask whether the latter paper was signed by three witnesses, or whether the testator had declared it to be his last will, no notice to produce it having been given. *Doe v. Morris*, 4 *Nev. and M.* 598.

Notice to produce; proof of possession of original.] In order to render a notice to produce available, it must be proved that

the original instrument is in the hands of the opposite party or of his privy. The nature of this evidence must vary according to the nature of the instrument. Where it belongs exclusively to the party, slight evidence is sufficient to raise a presumption that it is in his possession. Thus, where a solicitor proved that he had been employed by the defendant to solicit his certificate, and that looking at his entry of charges, he had no doubt the certificate was allowed, this was held to be proof of the certificate having come to the defendant's hands. *Henry v. Leigh,* 3 *Campb.* 502. Where the instrument has been delivered to a third person, between whom and the party to the suit there exists a privity, notice to the latter is sufficient, as in an action against the owner of a vessel for goods supplied to the use of the vessel, a notice to the defendant to produce the order for the goods, which had been delivered to the captain, is sufficient. *Baldney v. Ritchie,* 1 *Stark.* 338. So in an action against the sheriff, a notice to his attorney to produce a writ which has been returned to the under-sheriff, while the defendant was in office, is sufficient. *Taplin v. Atty,* 3 *Bingh.* 164. So also notice to a defendant to produce a check drawn by him, and paid by his banker, is sufficient to entitle the plaintiff to give secondary evidence of its contents, although the check remains in the banker's hands. *Partridge v. Coates, R. and M.* 156. *Burton v. Payne,* 2 *C. and P.* 520. But where a paper has been delivered to a third person, under whom the defendant justifies, and by whose directions he acted, a notice to produce, served upon the defendant, is not sufficient to authorize the admission of secondary evidence. *Evans v. Sweet, R. and M.* 83. *R. v. Pearce, Peake* 76. *But see Pritchard v. Symonds, B. N. P.* 254, *contra.* Where a document is in the hands of a person who holds it as trustee both for the party served with notice to produce and a third party, the notice to produce is not sufficient to let in secondary evidence, the party served must have such a right as will entitle him not merely to inspect but to retain. *Parry v. May,* 1 *Moo. and Rob.* 279.

Notice to produce, form of.] A notice to produce may be by parol, and if both a written and parol notice have been given, proof of either is sufficient. *Smith v. Young,* 1 *Campb.* 440. A notice to produce a particular letter must specify the letter intended; to produce "all letters," is too general. *France v. Lucy, R. and M.* 341. *Jones v. Edwards, M'Cl. and Y.* 139. If the title of the cause is misdescribed in the notice, it will be bad, as "A. assignee of B. and C. v. D." instead of "A. assignee of B. v. D." *Harvey v. Morgan,* 2 *Stark.* 19.

Notice to produce, service of, on whom.] In general it is sufficient, even in a *qui tam* action, to serve the notice to produce on the attorney or agent of the party. *Cates v. Winter,* 3 *T. R.*

306, 2 *T. R.* 203 (*n*). *Bryan v. Wagstaff, R. and M.* 327. But a notice to produce papers, not necessarily connected with the cause, served on the attorney so late as to prevent the party from receiving it in time before the trial, is not good. *Vine v. Lady Anson, M. and M.* 96. Where the attorney has been changed, a notice to produce served on the first attorney, before the change, is sufficient to entitle the party to call for production of the paper on the trial. *Doe v. Martin,* 1 *Moo. and Rob.* 242.

Notice to produce, time of service of.] The notice must appear to be a reasonable notice. Service of the notice upon the wife of the defendant's attorney, in a town cause, late in the evening before the trial, was ruled insufficient. *Doe v. Grey,* 1 *Stark.* 283. But notice to produce a letter, served on the attorney of the party, on the evening next but one before the trial, was ruled to be sufficient, though the party was out of England, the presumption being that, on going abroad, the party had left with his attorney the papers necessary for the conduct of the trial. *Bryan v. Wagstaff, R. and M.* 327. *See also Aflalo v. Foudrinier, M. and M.* 335 (*n*). And a notice served on the tenth of April, the trial being on the fourteenth, was ruled to be sufficient to let in secondary evidence of letters written eighteen years back, and addressed to the defendant, a foreigner, at his residence abroad. *Drabble v. Donner, R. and M.* 47. A notice to produce certain deeds was served on an attorney in Essex on Saturday, Monday being the commission day. He went to London and fetched them. On Monday evening notice was given to produce another deed. The attorney said it was in London, but should be fetched if the party would pay the expense of the journey. No offer to pay was made, the trial came on on Thursday, and it was held that the party could not give secondary evidence of the deed. *Doe v. Spitty,* 3 *B. and Ad.* 182. Notice to produce must be served before the commission day, on parties living away from the assize town. *Trist v. Johnson,* 1 *Moo. and Rob.* 259. A prisoner was indicted for arson. The commission day was the 15th March, and the trial came on on the 20th. A notice to produce served on the prisoner in gaol (his residence being ten miles distant) on the 18th, was held insufficient. *R. v. Ellicombe,* 5 *C. and P.* 522, 1 *Moo. and Rob.* 259, *S. C.*

Notice to produce, effect of.] If the party refuses to produce the papers required, such a circumstance does not afford any inference against him, it merely entitles the other party to give secondary evidence. *Cooper v. Gibbons,* 3 *Campb.* 363. *Lawson v. Sherwood,* 1 *Stark.* 315. Where a party has notice to produce a particular instrument, but does not say that he has not got it, though he has in fact delivered it to the Stamp Office, the

other party will be allowed to give parol evidence of the contents. *Sinclair v. Stephenson*, 1 *C. and P.* 585. If the party, giving the notice, declines to use the papers when produced, this, though matter of observation, will not make them evidence for the adverse party; *Sayer v. Kitchen*, 1 *Esp.* 210; though it is otherwise if the papers are inspected. *Wharam v. Routlege*, 5 *Esp.* 235. Secondary evidence of papers, to produce which, notice has been given, cannot be entered into, until the party calling for them has opened his case, before which time there can be no cross-examination as to their contents. *Graham v. Dyster*, 2 *Stark.* 23.

What is sufficient secondary evidence.] Where a notice to produce a deed has been given, and the deed is not produced, a counterpart, if in existence, is the next best evidence; *R. v. Castleton*, 6 *T. R.* 236; if there be no counterpart, an examined copy; if no examined copy, parol evidence. *B. N. P.* 254. It is said, however, by Parke, J., that there are no degrees in secondary evidence, and he ruled that where a defendant had kept a copy of a letter of which he had given the plaintiff notice to produce the original, he might, on the non-production, give parol evidence of the contents, and was not obliged to give in evidence the copy. *Brown v. Woodman*, 6 *C. and P.* 206. So an inscription on a tablet in a church may be proved by parol without an examined copy. *Doe v. Cole*, 6 *C. and P.* 359. Though it is said that the copy of a copy is not the best secondary evidence when the original copy can be produced. *Liebman v. Pooley*, 1 *Stark.* 167. Parol evidence of a writing may be given as secondary evidence, though the person who wrote the instrument is alive and not called. *Liebman v. Pooley*, 1 *Stark.* 167. Where possession has gone along for many years with a deed, the original of which is lost or destroyed, an old copy or abstract may be given in evidence, although not proved to be true, because it may be impossible to give better evidence. *B. N. P.* 254. After notice to the defendant to produce a letter, which he admitted he had received from the plaintiff, it was ruled that an entry, by a deceased clerk, in a letter-book, purporting to be a copy of a letter from the plaintiff to the defendant, was evidence of the contents, proof being given, that according to the course of business, letters of business written by the plaintiff, were copied by this clerk, and sent off by the post. *Pritt v. Fairclough*, 3 *Campb.* 305. So the copy of a letter, accompanied with a memorandum in the handwriting of a deceased clerk, purporting that the original had been forwarded by him, is evidence, with proof that this was the usual mode of transacting business. *Hagedorn v. Reid*, 3 *Campb.* 377. But where the practice of the defendant's counting-house was, that the clerk, after copying a letter into the letter-book, returned it to the defendant to seal, and that

he, or another clerk, carried all the letters to the post-office, but there was no particular place of deposit in the office for such letters, and neither of the clerks had any recollection of the particular letter, though they swore that they had uniformly carried all letters given them to carry, Lord Tenterden ruled that the copy in the letter-book was not evidence that the original had been sent. His Lordship added, "If the duty of the clerk had been to see the letters he copied carried to the post-office, it might have done." *Toosey v. Williams, M. and M.* 129. A copy taken by a copying-machine is not evidence, without a notice to produce the original. *Nodin v. Murray,* 3 *Campb.* 228. *See R. v. Watson,* 2 *Stark.* 129. An entry in the register-book at the custom-house, stating, that a certificate of register was granted on an affidavit of A. that he was an owner, is not admissible as secondary evidence of the contents of the affidavit; some person who has seen the affidavit, and knows that it was made by A., must be called. *Teed v. Martin,* 4 *Campb.* 90. To entitle a party to go into secondary evidence of a writ, after its return, it must be shown, that search has been made in the treasury, and that subsequently to the return day the writ was in the possession of the opposite party, on whom notice to produce it has been served. *Edmonstone v. Plaisted,* 4 *Esp.* 160. Where there are two parts of a written agreement, both executed at the same time, the one stamped and the other unstamped, the unstamped part is admissible as secondary evidence of the contents of the stamped part. *Waller v. Horsfall,* 1 *Campb.* 501. *Munn v. Godbold,* 3 *Bingh.* 292, 11 *B. Moore* 49, *S. C.*

In order to prove the endowment of a vicarage, an old ledger or chartulary of an abbey, containing amongst other things an account of the several matters of endowment, and found in the possession of the person who had succeeded to part of the abbey estates, was admitted as secondary evidence of the endowment, search having been made for the original endowment. *Bullen v. Mitchell,* 2 *Price,* 399, *S. C. in D. P.* 4 *Dow,* 297.

In an action against an executor for money had and received, after notice to produce the probate, the original will, produced by the officer of the ecclesiastical court, and bearing the seal of that court, and indorsed as the instrument on which probate was granted, with the value of the effects sworn to, is admissible as secondary evidence. *Gorton v. Dyson,* 1 *B. and B.* 219. So where, in an avowry for a rent-charge, the avowant could not produce the will under which he claimed (it belonging to the devisee of the land), but produced the ordinary's register of the will, and proved former payments, it was held sufficient evidence against the plaintiff, the devisee of the land charged. *B. N. P.* 246. But it seems in this case there should be a notice to produce. Where the assignment under a commission

of bankrupt was lost *before it was inrolled* pursuant to 6 G. 4. c. 16, s. 96, it was held that secondary evidence was admissible. *Giles v. Smith*, 1 *Crom. M. and R.* 462.

Parol evidence inferior to written evidence.] In general, parol evidence is esteemed secondary in its nature to written evidence. Thus, when an agreement has been reduced into writing, the writing must be produced; *Brewer v. Palmer*, 3 *Esp.* 213; *Doe v. Griffith*, 6 *Bingh.* 533; and if not properly stamped the plaintiff must be non-suited. Again, where a public company entered in their books a resolution with regard to the employment of a secretary, and the plaintiff afterwards engaged with them as such, it was held, in an action by him for work and labour, that he was bound to produce the book containing the resolution, the terms of the contract being contained in it. *Whitford v. Tutin*, 10 *Bingh.* 395, 4 *Moo. and S.* 166, *S. C.* But a mere memorandum, not signed by the parties, will not prevent the introduction of parol evidence. *Doe v. Cartwright*, 3 *B. and A.* 326; *and see Haukins v. Warr*, 3 *B. and C.* 698. So where a verbal contract is made for the sale of goods, and is put into writing afterwards by the vendor's agent, for the purpose of assisting his recollection, but not signed by the vendor, it may be proved by parol. *Dalison v. Stark*, 4 *Esp.* 163. So with regard to the memorandum of the terms of a lease not signed by the lessor, but only by the wife of the lessee. *R. v. St. Martin's, Leicester*, 4 *Nev. and M.* 202. In order to render the production of a writing necessary, it must appear to relate to the matter in question. Thus where parol evidence is offered to prove a tenancy, it is not a valid objection that there is some written agreement relative to the holding, unless it should also appear that the agreement was between the parties as landlord and tenant, and that it continues in force to the very time to which the parol evidence applies. *Doe v. Morris*, 12 *East*, 237. *See Stevens v. Penney*, 2 *B. Moore*, 349. Where, in ejectment, the plaintiff's witness proved an acknowledgment by the defendant that he held under T., and stated that he (the witness) had drawn an agreement touching the premises, between the plaintiff and T., it was held that the plaintiff was bound to produce the writing. *Fenn v. Griffith*, 6 *Bingh.* 533. *See* 1 *Nev. and M.* 10.

Parol evidence inadmissible to vary or contradict a writing.] As parol evidence is inferior to written evidence, it is not admitted to vary or contradict the terms of an instrument in writing. Thus where it was agreed in writing, that A., for certain considerations, should have the produce of Boreham meadow, it was held, that he could not prove by parol that he was to have both the soil and produce of Millcroft and of Boreham meadow. *Meres v. Ansell*, 3 *Wils.* 275; *and see Hope*

v. Atkins, 1 *Price*, 143. So parol evidence is inadmissible to show that a note, made payable on a day certain, was to be payable on a contingency only. *Dawson v. Walker*, 1 *Stark*. 361. *Woodbridge v. Spooner*, 3 *B. and A*. 233. *Foster v. Jolly*, 1 *Crom. M. and R*. 703. So where a promissory note is expressed to be made payable on demand, parol evidence of an agreement, entered into when it was made, that it should not be paid until a given event happened, is inadmissible. *Moseley v. Hanford*, 10 *B. and C*. 729. So where the conditions of sale described the number and kind of timber trees to be sold by lot, but not the weight of the timber, it was held, that parol evidence could not be given that the auctioneer had, at the sale, warranted the timber of a certain weight. *Powell v. Edmunds*, 12 *East*, 6. *Bradshaw v. Bennett*, 5 *C. and P*. 50. *Shelton v. Livius*, 2 *C. and J*. 411. So parol evidence is inadmissible to alter *the legal construction* of a written agreement. Thus where an agreement for the sale of goods was silent as to the time of delivery, in which case the law implies a contract to deliver in a reasonable time, it was held, that parol evidence of an agreement to take them away immediately was inadmissible. *Greaves v. Ashlin*, 3 *Campb*. 426. *Halliley v. Nicholson*, 1 *Price*, 404. But where, by agreement in writing, certain goods were to be delivered at fixed times, and part being delivered, a verbal agreement was made to extend the time for the delivery of the remainder, it was held, that evidence of such verbal agreement was admissible. *Cuff v. Penn*, 1 *M. and S*. 21, *doubted by Parke, J.*, 5 *B. and Ad*. 64. So parol evidence is admissible to show that a written contract between A. and B. was in fact made by B., not on his own account, but as agent. *Wilson v. Hart*, 7 *Taunt*. 295, 1 *B. Moore*, 45, *S. C.* Parol evidence is admissible of a contract collateral to that contained in a deed or writing, though relating to the same subject matter. *White v. Parker*, 12 *East*, 578. *Seago v. Deane*, 4 *Bingh*. 459. A distinction is to be observed on this head between contracts in writing under the statute of frauds, and contracts in writing at common law. In the former case a parol contract will not be admitted to alter the written contract, as where several lots of land were bought together, it cannot be shown that the purchaser has by parol waived the contract as to one lot to which the vendor could not make title. *Goss v. Lord Nugent*, 5 *B. and Ad*. 58, 2 *Nev. and M*. 28, *S. C.* But in that case the court said it would have been otherwise if the contract had not been subject to the control of an act of parliament; that where a contract has been reduced into writing, it is competent to the parties, at any time before the breach of it by a new contract, not in writing, either altogether to waive, dissolve, or alter the former agreement, or to qualify the terms of it, and thus to make a new contract, which is to be proved partly by the written agreement,

and partly by the subsequent verbal terms engrafted upon it. *Id. p.* 65.

Parol evidence admissible to prove an additional consideration in a written instrument, or to vary the date, &c.] Where no consideration is mentioned in a deed, a consideration may be averred and proved by parol, for such averment stands with the deed, and does not contradict or vary it. *Mildmay's case,* 1 *Rep.* 176, *a. Peacock v. Monk,* 1 *Ves.* 128. So where there is a consideration stated, an averment of another consideration, which is not contrary to the deed, may be made. *Ibid. Villers v. Beamont, Dyer,* 146, *a. Tull v. Parlett, M. and M.* 472. So in a settlement case, where the deed of conveyance stated the consideration of the purchase to be twenty-eight pounds, parol evidence was admitted to show that the consideration was in fact thirty pounds; *R. v. Scammonden,* 3 *T. R.* 474; or where it is stated to be money paid by J. M., that it was in fact parish money. *R. v. Llangunnor,* 2 *B. and Ad.* 616. So to prove that lands, described in the deed as being in the parish of A., were in fact in the parish of B. *R. v. Wickham,* 4 *Nev. and M.* 406. Parol evidence is admissible to prove a deed delivered on a day different from that on which it professes to have been indented and concluded. *Stone v. Bale,* 3 *Lev.* 348; *and see Steele v. Mart,* 4 *B. and C.* 272.

Parol evidence admissible to prove fraud in written instruments.] Where fraud is imputed, any consideration, however contrary to the averment of a deed, may be proved to show the fraudulent nature of the transaction. *B. N. P.* 173. *See Paxton v. Popham,* 9 *East,* 421. So in order to set aside a will for fraud, parol evidence may be given of what passed at the signing, and what the testator said. *Doe v. Allen,* 8 *T. R.* 147. But the party charged with the fraud will not be admitted to prove any other consideration than that stated. *Clarkson v. Hanway,* 2 *P. Wms.* 203.

Parol evidence admissible to prove custom not expressed in written instrument.] Where the parties have contracted in writing, in many instances parol evidence is admitted to prove a custom affecting the contract, on the ground, that where such a custom exists, the parties must be taken to have made their contract subject to its operation. Thus, in the construction of mercantile contracts, parol evidence is always admitted to show the sense in which, according to the usage and custom of merchants, such contracts are to be understood. As where a ship was warranted to depart with convoy, evidence of the usage amongst merchants was admitted to show that this meant convoy from the usual place of rendezvous. *Lethullier's Case,*

2 *Salk.* 443. So to explain the meaning of "days" in a bill of lading. *Cochran v. Retberg*, 3 *Esp.* 121. *See Donaldson v. Forster, Abbott on Shipp.* 209, 5th ed. *Birch v. Depeyster*, 4 *Campb.* 385, 1 *Stark.* 210, *S. C.* *Taylor v. Briggs*, 2 *C. and P.* 525. *Simpson v. Henderson, M. and M.* 300. *Haynes v. Holliday*, 7 *Bingh.* 587. So where there was an ambiguity on the face of an account, a clerk in the office in which the account was kept was permitted to explain the meaning of a particular item. *Hood v. Reeves*, 3 *C. and P.* 532. But proof of the usage of trade is not admissible to contradict the plain words of an instrument; as where a policy of insurance was "on the ship till moored at anchor twenty-four hours, and on the goods till discharged and safely landed," evidence of a usage, that the risk on the goods as well as the ship expired in twenty four-hours, was held inadmissible to qualify the clear and unequivocal words of the policy. *Parkinson v. Collier, Park Ins.* 416, 6th ed. So in an action on a warranty of "prime singed bacon," parol evidence was rejected of a practice, in the bacon trade, to receive bacon in some degree tainted, as "prime singed bacon." *Yates v. Bym*, 6 *Taunt.* 446, 2 *Marsh.* 141, *S. C.* So parol evidence is inadmissible to explain the meaning of the words "more or less" in a mercantile contract. *Cross v. Eglin*, 2 *B. and Ad.* 106. It has been doubted whether the practice of admitting parol evidence in these cases has not been carried to an inconvenient length. *See Anderson v. Pitcher*, 2 *B. and P.* 168.

A custom affecting the contract may be proved by parol in some other, as well as in mercantile contracts, as in the case of customs affecting agricultural contracts. Thus it may be proved, that a heriot is due by custom on the death of a tenant, though not expressed in the lease. *White v. Sayer, Palm.* 211. Or, that a lessee by deed is entitled by custom to an away-going crop, though it be not mentioned in the deed. *Wigglesworth v. Dallison, Dougl.* 201. So in the case of a lease not under seal. *Senior v. Armytage, Holt*, 197. But where a covenant, in express terms, or by necessary implication, excludes the customary right, evidence of such right is inadmissible. *Webb v. Plummer*, 2 *B. and A.* 746. *Roberts v. Barker*, 1 *Crom. and M.* 808. But the custom may still prevail, though the terms of the *holding* are inconsistent with it, where it only relates to the period of *quitting*. *Holding v. Pigott*, 7 *Bingh.* 475. *See also Smith v. Wilson*, 3 *B. and Ad.* 728.

Parol evidence may be given to explain the meaning of words used in a particular trade, as the word *level* in a mining lease. *Clayton v. Gregson*, 4 *Nev. and M.* 602.

Parol evidence admissible to explain ancient charters, grants, &c.] In the construction of ancient charters, parol evidence has always been admitted to prove the continual and imme-

morial usage under the instrument. 2 *Inst.* 282. *R v. Varlo, Cowp.* 248. *Chad v. Tilsed,* 2 *B. and B.* 406. *Governors of Lucton School v. Scarlett,* 2 *Y. and J.* 330. So in the construction of ancient grants and deeds there is no better way of construing them than by usage, and *contemporanea expositio* is the best way to go by. *Per Lord Hardwicke, Attorney General v. Parker,* 3 *Atk.* 576. However general the words of ancient grants may be, they are to be construed by evidence of the manner in which the thing has been always possessed and used. *Per Lord Ellenborough, Wild v. Hornby,* 7 *East,* 199. There seems to be no distinction in this respect between charters and private deeds. *Withnell v. Gartham,* 6 *T. R.* 398. *Stammers v. Dixon,* 7 *East,* 200. Evidence of usage, however, will not be admitted to overturn the clear words of a charter. *See R. v. Varlo, Cowp.* 248. In the case of modern deeds evidence of the acts of the parties is not admissible, in the construction of the instrument, to show their understanding of it. *Clifton v. Walmesley,* 5 *T. R.* 564. *Iggulden v. May,* 9 *Ves.* 333, 2 *N. R.* 452, *S. C. Moore v. Foley,* 6 *Ves.* 238.

Parol evidence admissible to discharge written agreements.] Although a deed cannot be revoked or discharged by parol, or even by writing, not under seal, yet an executory agreement, in writing, not under seal, may, before breach, be discharged by a subsequent parol agreement; *Lord Milton v. Edworth,* 6 *B. P. C.* 587; but after breach, it cannot be discharged, unless by deed or accord and satisfaction. *B. N. P.* 152. *Willoughby v. Backhouse,* 2 *B. and C.* 824. But it seems, that where the instrument is in writing pursuant to the statute of frauds, it cannot be discharged by a subsequent *parol* agreement before breach. *Goss v. Lord Nugent,* 5 *B. and Ad.* 58, *ante p.* 11; *but see* 1 *Phill. Ev.* 545, *Cuff v. Penn,* 1 *M. and S.* 21, *ante p.* 11. Though it is otherwise of written agreements at common law. *Id.*

Parol evidence admissible to explain latent ambiguity.] Where an ambiguity, not apparent on the face of a written instrument, is raised by the introduction of parol evidence, then from the necessity of the case, the same description of evidence is admitted to explain the ambiguity; for example, where a testator devises his estate of Blackacre, and has two estates called Blackacre, evidence may be admitted to show which of the Blackacres is meant; or if one devises to his son John Thomas, and he has two sons of the name of John Thomas, evidence may be admitted to show which of them the testator intended. *Per Gibbs, C. J., Doe v. Chichester,* 4 *Dow,* 93. *See Miller v. Travers,* 8 *Bingh.* 244. So where land is devised to a person designated by her Christian and surname only, and no person of that name claims under the devise, parol evidence is admis-

sible to show that the name was mistaken by the person who took the instructions for the will. *Beaumont v. Fell*, 2 *P. Wms.* 141, *and see Careless v. Careless*, 1 *Meriv.* 384. And where a devise was to S. H. *second* son of T. H., but in fact he was the third son, evidence of the state of the testator's family, and of other circumstances, was admitted to show whether he had mistaken the name or not. *Doe v. Huthwaite*, 3 *B. and A.* 632. So where a fine was levied of twelve messuages in Chelsea, and it appeared that the cognizor had more than twelve messuages in Chelsea, parol evidence was admitted to show which messuages in particular the cognizor intended to pass. *Doe v. Wilford*, *R. and M.* 88. 8 *D. and R.* 549. Where a subject matter exists, which satisfies the terms of the will, and to which they are perfectly applicable, there is no latent ambiguity, and no evidence can be admitted for the purpose of applying the terms to a different object. 3 *Stark. Ev.* 1026, 1st ed. Thus, where a testator devised his "estate at Ashton," it was held, that parol evidence was inadmissible to show that he was accustomed to call all his maternal estate "his Ashton estate," there being an estate in the parish of Ashton which was sufficient to satisfy the devise. *Doe v. Oxendon*, 3 *Taunt.* 147, *S. C. in Error*, 4 *Dow*, 65. *See also Carruthers v. Sheddon*, 6 *Taunt.* 14. A reference in the will to extrinsic facts, as part of the description of the subject devised, does not, if such facts, when proved, raise no ambiguity, authorize the entering into extrinsic evidence to shew the intentions of the testator. *Doe v. Martin*, 1 *Nev. and M.* 533. Parol evidence of a testator's intention at the time of making his will is admissible to show that he intended his executor to take the residue. *Williams v. Jones*, 10 *Ves.* 77. But not where the executor has a legacy for his trouble. *Whitaker v. Tatham*, 7 *Bingh.* 628.

In the construction of a will, certain collateral facts, such as the situation of the lands in question, and the state of the testator's family, are admissible to explain his intention. *Doe v. Langton*, 2 *B. and Ad.* 680.

Where the ambiguity is not latent, and raised by extrinsic evidence, but patent or apparent on the face of the instrument, parol evidence is not admissible to explain such ambiguity. Thus, where a blank is left for the devisee's name in a will, parol evidence cannot be admitted to show whose name was intended to be inserted. *Baylis v. Att. Gen.* 2 *Atk.* 239. *See Doe v. Westlake*, 4 *B. and A.* 57. But where a blank was left for the Christian name only, parol evidence was admitted to prove the individual intended. *Price v. Page*, 4 *Ves.* 680. So in case of a devise "to Mrs. C." the Chancellor referred it to the Master to receive evidence, to show the person intended. *Abbott v. Massie*, 3 *Ves.* 148.

Where a blank is left in a written agreement, which need not

have been reduced into writing, and would have been equally binding if written or unwritten (as if the agreement were to deliver goods to the amount of less than ten pounds, and a blank were left for the quantity of goods to be delivered), in such a case it is presumed, in an action for the non-performance of the contract, parol evidence might be admitted to show the quantity for which the parties agreed. 1 *Phill. Ev.* 521. *Vide ante, p.* 11. So where in the bishop's register, a blank was left for the patron's name, it was held, that this might be supplied by parol evidence. *B. of Meath v. Lord Belfield,* 1 *Wils.* 215.

Parol evidence admissible on questions of parcel or no parcel.] Where the question is "parcel or no parcel," parol evidence is admissible to explain a writing. Thus, where a testator devised "all his farm called Trogues farm," it was held that it might be shown, by evidence, of what parcels the farm consisted. *Goodtitle v. Southern,* 1 *Maule and S.* 299. So in case of a written agreement to convey "all those brick-works in the possession of A. B." declarations of A. B. at the time of the agreement, were admitted to show what the brick-works were. *Paddock v. Fradley,* 1 *Crom. and J.* 90; *and see Davis v. Lewis,* 2 *Chitty's Rep.* 636, 8 *D. and R.* 554.

Parol evidence admissible to prove a certain relation between parties.] The relation or relative situation of two parties may be proved by parol, though the contract out of which that relation arises be in writing. Thus, in a settlement case, it has been held that parol evidence of the fact of tenancy is admissible, though the pauper held under a written contract. *R. v. Inhab. of Holy Trinity,* 7 *B. and C.* 611; *sed vide Strother v. Barr,* 5 *Bingh.* 155. But though the fact of *a tenancy* may be proved, yet parol evidence cannot be received to show under whom the tenant came into possession. *Doe v. Harvey,* 8 *Bingh.* 239. Where a tenancy is thus *primâ facie* proved by parol, the other party, who wishes to vary the terms of the tenancy, must produce the written instrument. *R. v. Rawdon,* 8 *B. and C.* 708. So a partnership may be proved by parol, although there is a deed of copartnership. *Alderson v. Clay,* 1 *Stark.* 405; *and see Harvey v. Ray,* 9 *B. and C.* 356. *Vide ante, p.* 1.

PRESUMPTIVE EVIDENCE.

Presumptive evidence, though liable to be rebutted by evidence to the contrary, is not, in its nature, secondary to positive evidence. Thus, although the payment of rent may be proved by the positive evidence of a person who saw it paid, yet it may also be proved by the production of a receipt for later

arrears (which affords a presumption that the earlier arrears are satisfied), without laying any ground for the introduction of such evidence by showing that positive evidence cannot be procured. *Vide post.*

As almost every fact is capable of being proved by presumptive, as well as by positive evidence, a few of the most useful cases only will be selected as examples of the nature and application of presumptive evidence. In case of an ancient recovery, accompanied by possession, it shall be presumed, that the tenant to the *præcipe* was seised of the freehold, and such seisin need not be proved. *Gilb. Ev.* 27. So a deed, thirty years old or upwards, is presumed to have been duly executed, provided some account be given of the deed, where found, &c. *B. N. P.* 255. An endowment of a vicarage may be presumed, from the long and continued possession of tithes and other profits. *Crimes v. Smith,* 12 *Rep.* 4; *and see Wolley v. Brownhill, M'Clel.* 332. A licence may be presumed; thus, where an inclosure having been made from a waste, twelve or fourteen years, and seen by the steward of the lord from time to time, without objection made, it was left to the jury to say whether or not the inclosure was made by the lord's licence. *Doe v. Wilson,* 11 *East,* 56. The existence of an immemorial custom may be presumed from an uncontradicted usage of twenty years. *R. v. Joliffe,* 2 *B. and C.* 54, 3 *D. and R.* 240, *S. C. Jenkins v. Harvey,* 1 *Crom. M. and R.* 877. The flowing of the tide is presumptive evidence of a public navigable river. *Miles v. Rose,* 5 *Taunt.* 705, 1 *Marsh.* 313, *S. C.* But the strength of this *primâ facie* evidence depends upon the situation and nature of the channel. *R. v. Montague,* 4 *B. and C.* 602.

A letter is presumed to have been written on the day on which it is dated. *Hunt v. Massey,* 3 *Nev. and M.* 109. So indorsements on a promissory note, admitting the receipt of interest, are presumed to have been made at the time they bear date. *Smith v. Battens,* 1 *Moo. and Rob.* 341.

Presumption of payment.] If a landlord give a receipt for the rent last due, it is to be presumed that all former rent due by the tenant has been paid. *Gilb. Ev.* 157. If the acquittance is under seal, it is an estoppel, and the presumption cannot be rebutted. *Ibid.* 158. Where a bill of exchange, negotiated after acceptance, is produced from the hands of the acceptor after it is due, the presumption is, that the acceptor has paid it. *Gibbon v. Featherstonehaugh,* 1 *Stark.* 225. *Pfiel v. Vanbatenberg,* 2 *Campb.* 439. Proof that the plaintiff, and other workmen employed by the defendant, came regularly to receive their wages from the defendant, whose practice was to pay every week, and that the plaintiff had not been heard to

complain of non-payment, is presumptive evidence of payment. *Lucas v. Novosilieski*, 1 *Esp.* 296. *Sellen v. Norman*, 4 *C. and P.* 80. So where the demand was for the proceeds of milk sold daily to customers by the defendant, as agent to the plaintiff, and it appeared that the course of dealing was for the defendant to pay the plaintiff, every day, the money which she had received, without any written voucher passing, it was ruled that it was to be presumed, that the defendant had in fact accounted, and that the *onus* of proving the contrary lay on the plaintiff. *Evans v. Birch*, 3 *Campb.* 10. So where goods have been consigned to a factor to sell on commission, it may be presumed after a reasonable time (*e. g.* 14 years) has elapsed, that he has accounted. *Topham v. Braddick*, 1 *Taunt.* 572. Although, in analogy to the case of bonds, Lord Ellenborough ruled that a promissory note might be presumed to be paid after twenty years; *Duffield* v. *Creed*, 5 *Esp.* 52; yet it has since been held that the case is distinguishable from that of bonds, and that the rule as to twenty years does not apply. *Du Belloix v. Lord Waterford*, 1 *D. and R.* 16. The mere production of a check drawn by the defendant on his banker, and payable to the plaintiff, with proof that he indorsed his name upon it, and that it has been paid, affords *primâ facie* evidence of payment to him. *Egg v. Barnett*, 3 *Esp.* 196. *Boswell v. Smith*, 6 *C. and P.* 60. *Pearce v. Davis*, 1 *Moo. and Rob.* 365. But it was ruled by Dallas, C. J., that the mere proof of a check being made payable to A. and of A. having received payment of it, is not evidence of the payment of money *by the maker* to A., for it might have been given to a third person, and by him to A. *Lloyd v. Sandilands, Gow*, 16; *sed quære.*

Although the limitation of actions on bonds is now provided for by stat. 3 & 4 W. 4, c. 42, (*vide post* "*Debt on Bond*,") yet a reference to the former law may still occasionally be necessary. Payment of a bond was presumed after twenty years, without demand made; *Oswald v. Leigh*, 1 *T. R.* 270; and even after the lapse of a less time, if other circumstances concurred to fortify the presumption, as a settlement of accounts in the mean time. *Ibid. Colsel v. Budd*, 1 *Campb.* 27. The presumption might be rebutted by circumstances, as by the defendant's admission of the debt, or by proof of payment of interest within twenty years. *Vide infra.* So by proof that the defendant had resided abroad during the whole of the time; *Newman v. Newman*, 1 *Stark.* 101; *Elliott v. Elliott*, 1 *Moo. and Rob.* 44; but proof of the defendant's poverty was not sufficient to rebut the presumption. *Willaume v. Gorges*, 1 *Campb.* 217. Indorsements on the bond, made by the obligee, acknowledging the receipt of interest within twenty years, were admitted to rebut the presumption, provided there was

evidence that such indorsements existed before the presumption of payment arose. *Searle v. Lord Barrington*, 2 *Str.* 826; *Rose v. Bryant*, 2 *Campb.* 322; *Gleadow v. Atkin*, 1 *Crom. and M.* 421; *and see* 2 *Phill. Ev.* 137, 1 *Stark. Ev.* 310. An indorsement made withih twenty years, of the payment of interest within twenty years, was sufficient to rebut the presumption, though the interest accrued beyond twenty years. *Sanders v. Meredith*, 3 *Mann. and R.* 116.

Presumption of property.] Proof of the possession of land, or of the receipt of rent from the person in possession, is *primâ facie* evidence of seisin in fee. *See post in* "*Ejectment.*" The owner of the fee-simple is presumed to have a right to the minerals, but that presumption may be rebutted by absence of enjoyment, and user by persons, not the owners of the soil. *Rowe v. Grenfel, R. and M.* 396. *See Rowe v. Brenton*, 8 *B. and C.* 737. Payment of a small unvaried rent for a long series of years [38] to the lord of a manor, raises the presumption that the rent is a quit rent, and not that the lord is entitled to the land. *Dow v. Johnson, Gow*, 173. A recovery in trover for a parcel of lead dug out of a mine affords no evidence of the plaintiff's possession of the mine. *B. N. P.* 33. Possession of personal chattels is *primâ facie* evidence of property, *see post, in* "*Assumpsit on Policy of Insurance.*" *And see more as to the presumption of ownership, post* "*Trespass.*"

Presumption of grants, &c.] Evidence of an adverse enjoyment of lights for twenty years or upwards, unexplained, affords a presumption of a grant to enjoy such lights; *Lewis v. Price*, 2 *Saund.* 175 (*n*); and now by stat. 2 & 3 W. 4, c. 71, *post p.* 24, such right is indefeasible after the twenty years. So an adverse unexplained enjoyment of a right of way for above twenty years, is sufficient to warrant a jury in presuming a grant of the way, though such grant must have been made within twenty-six years, all former ways being at that time extinguished by operation of an inclosure act. *Campbell v. Wilson*, 3 *East*, 294. And now by the above statute, the right cannot be defeated by showing that the way was first enjoyed at some period previous to the twenty years, *vide post, p.* 24, and becomes indefeasible in forty years. Where the defendant pleaded a right of way granted by a lost deed, and the plaintiff traversed the grant, and the judge directed the jury, that if they thought the defendant had exercised the right of way uninterruptedly for more than twenty years by virtue of a deed, they would find for the defendant; but, if they thought there had been no way granted by deed, they would find for the plaintiff: it was held, that this direction was right. *Levett v. Wilson*, 3 *Bingh.* 115. See statute 2 & 3 W. 4, c. 71, *post* "*case for Dis-*

turbance of Way," and *post, p.* 23. The uninterrupted possession of a pew for thirty-six years affords a presumption of title. *Rogers v. Brooks, cited* 1 *T. R.* 431 (*n*). Twenty years' exclusive possession of a stream of water, in any particular manner, affords a conclusive presumption of right in the party enjoying it, derived from a grant or act of parliament. *Per Lord Ellenborough, C. J., Bealey v. Shaw,* 6 *East,* 215. *See Mason v. Hill,* 3 *B. and Ad.* 304, 5 *B. and Ad.* 1. Where it was proved, that the owners of a fishery and their lessees had for above twenty years publicly landed their nets on another's ground, and had occasionally repaired the landing-places, it was held that it was properly left to the jury to presume a grant of the right of landing nets to the owners of the fishery. *Gray v. Bond,* 2 *B. and B.* 667. In order to establish the presumption of a grant of a way, it must appear that the possession was with the acquiescence of him who was seised of an estate of inheritance; for a tenant for life or years has no power to grant such right; *Bright v. Walker,* 1 *Crom. M. and R.* 219, stated *post "case for Disturbance of Way;" Daniel v. North,* 11 *East,* 372; *Barker v. Richardson,* 4 *B. and A.* 579; but, if the easement existed previously to the commencement of the tenancy, the fact of the premises having been for a long time in the possession of a tenant will not defeat the presumption of a grant. *Cross v. Lewis,* 2 *B. and C.* 686.

Charters and grants from the crown may be presumed from great length of possession, as for instance, 100 years, not merely in suits between private parties, but even against the crown itself, if the crown were capable of making the grant. *R. v. Brown, cited Cowp.* 110. *Mayor of Kingston v. Horner, Cowp.* 102. *Jenkins v. Harvey,* 1 *Crom. M. and R.* 877. Where the origin of the possession is accounted for without the aid of grant or conveyance, and is consistent with the fact of there having been no conveyance, it is a question for the jury whether in fact any conveyance has actually been executed. *Doe v. Reed,* 5 *B. and A.* 232, *and see post in " Ejectment."*

The possession of a lease by the lessor, with the seals cut off, affords no presumption of a surrender. *Doe v. Thomas,* 3 *B. and C.* 288.

Where a feoffment has been proved, livery of seisin may be presumed after twenty years, if possession has gone along with the feoffment; *Biden v. Loveday, cited* 1 *Vern.* 196, *Rees v. Lloyd, Wightw.* 123; but a less time than twenty years is not sufficient. *Doe v. Marquis of Cleveland,* 9 *B. and C.* 864, 4 *Mann. and R.* 666, *S. C.*

Presumption of dedication of way to the public.] If the owner of the soil throws open a passage, and neither marks by any

visible distinction that he means to preserve all his rights over it, nor excludes persons from passing over it by positive prohibition, he shall be presumed to have dedicated it to the public; *per Lord Ellenborough. R. v. Lloyd,* 1 *Campb.* 262; but proof of a bar having been placed across the street, soon after the houses which form the street were finished, will rebut the presumption of dedication, though the bar was soon afterwards knocked down, since which period the way has been used as a thoroughfare, for a dedication must be made openly, and with a deliberate purpose. *Roberts v. Karr,* 2 *Campb.* 262 (*n*). The question of dedication depends upon the time and nature of the enjoyment which persons have had of the passage over the land; therefore, where the plaintiff erected a street leading out of a highway across his own close, and terminating at the edge of the defendant's adjoining close, which was separated by the defendant's fence from the end of the street, for twenty-one years, (during nineteen of which the houses were completed, and the street publicly watched, cleansed and lighted, and both footways, and half the horseway, paved at the expense of the inhabitants,) it was held, that this street was not to be presumed to be so dedicated to the public, as that the defendant, pulling down his own wall, might enter it at the end adjoining to his land, and use it as a highway. *Woodyer v. Hadden,* 5 *Taunt.* 125. It seems that there may be a limited dedication of a highway to the public. *Marq. of Staff. v. Coyney,* 7 *B. and C.* 257. Trustees in whom land is vested for public purposes, may dedicate the surface of it to the use of the public as a highway, if such use be not inconsistent with the purposes of their trust. *R. v. Leake,* 5 *B. and Ad.* 469, 2 *Nev. and M.* 583, *S. C.*

If a person opens his land, so that the public pass over it continually, they will, after a very few years, be entitled to pass over it and use it as a way; and if the owner does not mean to dedicate it as a way, but only to give a licence, he should do some act to show that he gives a licence only. The common course is to shut it up one day in the year. *Trustees of British Museum v. Furnis,* 5 *C. and P.* 460. It has been held, in one case, that six years are sufficient to found the presumption of dedication; 11 *East,* 376 (*n*); and where the *locus in quo* had been in lease for a long term up to the year 1780, and from that year till the year 1788, the public were permitted to have the free use of it, as a way, Lord Kenyon held it to be quite a sufficient time for presuming a dedication. *Trustees of Rugby Charity v. Merryweather,* 11 *East,* 376 (*n*). If the land is in the possession of a tenant, such tenant cannot dedicate it to the public so as to bind the owner of the fee. *Wood v. Veal,* 5 *B. and A.* 454. But, after a long lapse of time, and a frequent change of tenants, Lord Ellenborough said, that from the notorious and uninterrupted use of a way

by the public, he should presume that the landlord had notice of the way being used, and that it was so used with his concurrence. *R. v. Barr*, 4 *Campb.* 16. Where a public footway over crown land was extinguished by an inclosure act, but for twenty years after the inclosure took place, the public had continued to use the way, it was ruled by Bayley, J., that this user was no evidence of a dedication to the public, as it did not appear to have been with the knowledge of the crown. *Harper v. Charlesworth*, 4 *B. and C.* 574.

Presumption of the duration of life.] As to persons of whom no account can be given, the presumption of the duration of life ends at the expiration of seven years from the time when they were last known to be living. *Per Lord Ellenborough, Doe v. Jesson*, 6 *East*, 84; *see also Doe v. Deakin*, 4 *B and A.* 433. Proof by one of a family, that many years before, a younger brother of the person last seised had gone abroad, and that the repute of the family was, that he had died there, and that the witness had never heard in the family of his having been married, is presumptive evidence of his death without issue. *Doe v. Griffin*, 15 *East*, 293. *Doe v. Wolley*, 8 *B. and C.* 22, 3 *C. and P.* 402, *S. C.* Proof that a person sailed in a ship bound for the West Indies two or three years ago, and that the ship has not since been heard of, is presumptive evidence that the person is dead; but the time of the death, if material, must depend upon the particular circumstances of the case. *Watson v. King*, 1 *Stark.* 121; *and see more as to presumption of loss of missing ship, post "Assumpsit on Policy of Insurance."* The fact of the party being alive or dead at any *particular period* within, or at the end of the seven years, must be proved by the party asserting that fact. *Doe v. Nepean*, 5 *B. and Ad.* 86; *and see Rex v. Harborne*, 4 *Nev. and M.* 341.

Presumption as to the legality or regularity of acts.] A person will not be presumed to have committed an unlawful act: therefore, when performances appeared to have taken place at a theatre, a licence was presumed. *Rodwell v. Ridge*, 1 *C. and P.* 220. But where the act directing the licence likewise directs that a notice of it shall be painted on the outside of the house, and there is no such licence painted, it will be presumed that there is no licence. *Gregory v. Tuffs*, 6 *C. and P.* 271. So when a man has been elected to a corporate office, the presumption is that he has taken the sacrament according to law. *R. v. Hawkins*, 10 *East*, 211. So a fact may be presumed from the regular course of a public office. Thus where it was proved that the custom-house would not permit an entry to be made, unless there had been an indorsement or a licence, the licence being lost, it was held, that from the

entry the indorsement might be presumed. *Butler v. Allnutt*, 1 *Stark*. 222. So the fact of a person acting in an official capacity, as a surrogate, is *primâ facie* evidence that he was duly appointed and had competent authority. *R. v. Verelst*, 3 *Campb.* 432. *Pritchard v. Walker*, 3 *C. and P.* 212. So though an appointment is in writing, as in the case of justices of the peace, constables, &c. *Berryman v. Wise*, 4 *T. R.* 366. So where a constable has been appointed by commissioners under a local act. *Butler v. Ford*, 1 *Crom. and M.* 662. So where it is necessary to prove the swearing of an affidavit before a commissioner, evidence of his acting as such is sufficient. *R. v. Howard*, 1 *Moo. and R.* 187. But in all these cases the evidence is only presumptive and may be rebutted. 1 *C. and M.* 669.

Presumption of knowledge.] In many cases, though the fact of actual knowledge cannot be proved, it will be presumed. Thus, where the rules of a club were contained in a book kept by the master of the club, every member of the club must be presumed to be acquainted with them. *Raggett v. Musgrave*, 2 *C. and P.* 556. *Alderson v. Clay*, 1 *Stark.* 405. *Wiltzie v. Adamson*, 1 *Phill. Ev.* 252, 6th ed.

The *Prescription Act*, introduced by Lord Tenterden, (2 and 3 W. 4, c. 71,) has produced a great alteration in the law regarding presumptions, and it has therefore been thought proper to give the principal provisions which it contains under the present head.

Commons, &c.] By Section 1, no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any right of common or other profit or benefit to be taken and enjoyed from or upon any land of our Sovereign Lord the King, his heirs or successors, or any land being parcel of the duchy of Lancaster, or of the duchy of Cornwall, or of any ecclesiastical or lay person, or body corporate, except such matters and things as are herein specially provided for, and except tithes, rent, and services, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by showing only that such right, profit, or benefit, was first taken or enjoyed at any time prior to such period of thirty years; but nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid, for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some

consent or agreement expressly made or given for that purpose by deed or writing.

Right of way, watercourse, &c.] By Section 2, no claim which may be lawfully made at the common law, by custom, prescription, or grant to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water of our said Lord the King, his heirs or successors, or being parcel of the duchy of Lancaster, or of the duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto, without interruption, for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years; but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned, shall have been so enjoyed as aforesaid, for the full period of forty years, the right thereto shall be esteemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

Light.] By Section 3, when the access and use of light to and for any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

Periods of limitation, how reckoned.] By Section 4, each of the respective periods of years herein before mentioned, shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question; and that no act or other matter shall be deemed to be an interruption within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made.

Right, how alleged.] By Section 5, in all actions upon

upon the case and other pleadings, wherein the party claiming may now by law allege his right generally without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient; and if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and that in all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed, for and during such of the periods mentioned in this act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of fact, or of law, not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation.

Presumption, how restricted.] By Section 6, in the several cases mentioned in and provided for by this act, no presumption shall be allowed or made, in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this act as may be applicable to the case and to the nature of the claim.

Proviso for infants, &c.] By Section 7 it is provided, that the time during which any person, otherwise capable of resisting any claim to any of the matters before mentioned, shall have been or shall be an infant, idiot, *non compos mentis*, *feme covert*, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible.

When land or water held for life, &c.] By Section 8 it is provided, that when any land or water, upon, over, or from which any such way or other convenient watercourse or use of water shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the

granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall, within three years next after the end or sooner determination of such term, be resisted by any person entitled to any reversion expectant on the determination thereof.

HEARSAY.

It is a general rule of evidence, that hearsay is inadmissible; *see Spargo v. Brown, 9 B. and C.* 935; since it is the mere repetition of evidence, not given under the sanction of an oath, and without the test of truth which is afforded by a cross-examination in open court. There are however certain instances in which, from the necessity of the case, hearsay is received.

Hearsay admissible in questions of pedigree.] In questions of pedigree, the oral, or written declarations of deceased members of the family are admissible to prove the pedigree. Declarations in a family, descriptions in wills, inscriptions upon monuments, in Bibles, and registry books, are all admitted, upon the principle that they are the natural effusions of a party who must know the truth, and who speaks upon an occasion where the mind stands in an even position without any temptation to exceed, or fall short of the truth. *Per Lord Eldon, Whitelock v. Baker*, 13 *Ves.* 514. *Higham v. Ridgway*, 10 *East*, 120. *B. N. P.* 233. So a pedigree hung up in a family mansion is good evidence. *Goodright v. Moss, Cowp.* 594. So a paper in the handwriting of a deceased member of the family, purporting to give a genealogical account of the family, is admissible, though never made public by the writer, though erroneous in many particulars, and professing to be founded chiefly on hearsay. *Monkton v. Att. Gen.* 2 *Russ. and Myl.* 147. So a ring worn publicly, stating the date of the person's death whose name is engraved upon it. *Per Brougham, C., Monkton v. Att. Gen.* 2 *Russ. and Myl.* 162. The declarations of a parent are good evidence to prove the *time* of the birth of a child; *Herbert v. Tucal, R. Raym.* 84, 7 *East*, 290; but not, it is said, the *place* of birth; *R. v. Erith*, 8 *East*, 542. But where statements, contained in monumental inscriptions, and declarations made by a deceased relation, were offered in evidence upon the trial of an issue out of chancery, to prove *the ages* of the parties referred, Tindal, C. J., rejected the evidence; but Brougham, C., after argument, expressed a very strong opinion in favour of its admissibility. He afterwards stated, that he had the concurring opinions of Mr. Justice Littledale and Mr. Justice Park; but the suit being compromised, no further opinion was delivered. In the argument a case was cited, (*Rider v. Malbone*,)

tried before Mr. Justice Littledale, where an inscription on a tombstone, stating the death of a party at ninety years, was admitted as evidence, and the age was in that case material. *Kidney v. Cockburn, 2 Russ. and Myl.* 167. But the entry of the time of a child's birth in a public register has been held not to be evidence as to the *time* of the birth, unless it be proved that the entry was made by the direction of the father or mother, for a clergyman has no authority to make an entry as to the time of the birth. *Wihen v. Law, 3 Stark.* 63. A bill in Chancery by a father, stating his pedigree, is also admissible, in the same manner as an inscription on a tomb-stone, or in a Bible. *Taylor v. Cole, 7 T. R.* 3 (*n*). So an old and cancelled will. *Doe v. Pembroke, 11 East,* 504.

It is not necessary that the declarations should be contemporaneous with the matters declared. Thus a person's declaration that his grandmother's maiden name was A. B. is admissible. *Per Brougham, C., Monkton v. Att. Gen.* 2 *Russ. and Myl.* 158.

Hearsay, of what persons, admissible in questions of pedigree.] The hearsay must be from persons having such a connection with the party to whom it relates, that it is natural and likely, from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken. *Per Lord Eldon, Whitelocke v. Baker,* 13 *Ves.* 514. Declarations by a deceased husband as to the legitimacy of his wife, and as to the pedigree of her family, are evidence. *Vowels v. Young,* 13 *Ves.* 148. *Doe v. Harvey, Ry. and Moo.* 297. The declaration of a surgeon respecting the time of a birth at which he attended, is evidence, as having been made on a matter peculiarly within his knowledge, and which he had no interest to misrepresent. *Higham v. Ridgway,* 10 *East,* 109. The following is given by Mr. Baron Bayley as his note of the above case; An entry by a man who is dead will be evidence as to strangers, if it relates to a fact peculiarly within his own knowledge, if he had no interest in misrepresenting it, or if the entry either charges him with the receipt of money for a third person, or imports that a debt which would otherwise be due to him is discharged. "There is not one single syllable," adds the learned judge, "in my note as to the qualification that he could be examined in his lifetime." *Gladow v. Atkin,* 1 *C & M.* 424; *Vin. Ab. Ev.* (*T. b.* 91); 1 *Phill. Ev.* 228. The declarations of servants and intimate acquaintances are not admissible. *Johnson v. Lawson,* 2 *Bingh.* 86, 9 *B. Moore,* 183, *S. C.* The declarations of a deceased person as to the fact of his own marriage are evidence. *B. N. P.* 112, *R. v. Bramley,* 6 *T. R.* 330. But the declarations of a deceased mother, as to the non-access of her husband, are not evidence, for she would not have been allowed to prove that fact in person if alive. *B. N. P.* 112. *R. v. Luffe,* 8 *East,* 193. *Goodright v.*

Moss, Cowp. 594. Although to admit the declarations it is necessary to give evidence, *dehors*, of the connection of the person making them, with the family, yet where the question is whether A. be related to C., the declarations of B., who is proved to be related to A., are evidence to prove C. related to A., without evidence *dehors* to shew B. related to C. *Monkton v. Att. Gen.* 2 *Russ. and Myl.* 156.

It is no objection that the person who made the declaration stood in *pari casu* with the person tendering it in evidence. *Id.* 159. *Doe v. Turner, Ry. and Moo. N. P. C.* 142.

Hearsay in questions of pedigree not admissible post litem motam.] If the declarations have been made after a controversy has arisen with regard to the point in question, they are inadmissible. *Berkeley Peerage case*, 4 *Campb.* 401. *Banbury Peerage case*, 2 *Selw. N. P.* 712. 4th ed. It is not necessary, in order to exclude the evidence, to show that the controversy was known to the person making the declaration. 4 *Campb.* 417. The term *controversy* must not be merely understood as signifying an existing suit. *Monkton v. Att. Gen.* 2 *Russ. and Myl.* 161. It is said by Alderson B., that the commencement of a controversy must be taken to be the arising of that state of facts on which the claim in question is founded, without any thing more. *Walker v. Beauchamp*, 6 *C. and P.* 552.

Hearsay admissible to prove public rights, and rights in the nature of public rights.] Hearsay, or common reputation, is admissible to prove public, or general rights. *See the Berkeley Peerage case*, 4 *Campb.* 415. *Weeks v. Sparke*, 1 *M. and S.* 686. *Morewood v. Wood*, 14 *East*, 329. So it is admissible to prove a right affecting a number of persons, and which is therefore in the nature of a public right; as a manorial custom; *Denn v. Spray*, 1 *T. R.* 466; the boundaries between parishes or manors; *Nichols v. Parker*, 14 *East*, 331; or a modus; *Weeks v. Sparke*, 1 *Maule and S.* 691; but to prove a prescriptive right, strictly private, it is doubtful whether hearsay evidence is admissible. *Morewood v. Wood*, 14 *East*, 327. *Outram v. Morewood*, 5 *T. R.* 123. *Withnell v. Gartham*, 1 *Esp.* 324. *B. N. P.* 295. *Blackett v. Lowes*, 2 *Maule and S.* 494. *Richards v. Bassett*, 10 *B. and C.* 663. 1 *Phil. Ev.* 238. 1 *Stark. Ev.* 61. On a question whether a certain road was a highway, a copper-plate map was produced, in which it was so described. It purported to have been taken by the direction of the churchwardens. The plaintiff offered to prove that it was generally received in the parish as an authentic map, but Lord Kenyon rejected the evidence. *Pollard v. Scott, Peake*, 18. Though general reputation is evidence, yet the tradition of a particular fact is not. *Weeks v. Sparke*, 1 *Maule and S.* 687. *Ireland v. Powell, Peake, Ev.* 15. *Cooke v. Banks*, 2 *C.*

and P. 481. Before a customary right, &c. can be proved by evidence of reputation, a foundation must be laid by showing acts of ownership, and then the evidence of reputation becomes admissible, such evidence being confined to what old persons, who were in a situation to know what these rights are, have been heard to say concerning them. *Ibid.* The rule with regard to the parties from whom the declarations proceed has been thus laid down. In cases of rights or customs, which are not strictly speaking public, but of a general nature and concern a multitude of persons, as questions with respect to boundaries, and customs of particular districts, it seems, that hearsay evidence is not admissible, unless it is derived from persons conversant with the neighbourhood. On the other hand, actual inhabitancy in the place, the boundaries of which are in dispute, is unnecessary. But where the right is really public, a claim of highway for instance, in which all the king's subjects are interested, it seems difficult to say that there ought to be any such limitation. In a matter in which all are concerned, reputation from any one appears to be receivable, but of course it would be almost worthless unless it came from persons who are shown to have some means of knowledge, as by living in the neighbourhood, or frequently using the road in dispute. *Per Parke, B., delivering the judgment of the court in Crease v. Barrett,* 1 *Crom. M. and R.* 919. Thus a document purporting to be a decree of certain persons, the Lord Treasurer and Chancellor of the Exchequer, &c., who had no authority as a court, was held to be inadmissible evidence, as reputation, on a question whether the city of Chester, before it was made a county of itself, formed a part of the county palatine, because those personages had from their situations no peculiar knowledge of the facts. *Rogers v. Wood,* 2 *B. and Ad.* 245. So the answers of the tenants of a manor, to a commission of survey issued by the lord, finding his right to wreck, are no evidence of that right, they having no peculiar means of knowledge, and the lord's title not being a matter of public concern. *Talbot v. Lewis,* 1 *Crom. M. and R.* 495. But ancient answers of the conventionary tenants of a manor, stating the rights of the lord of the manor, are evidence even against the freeholders, but not of any *facts* which they may state. *Crease v. Barrett,* 1 *Crom. M. and R.* 919.

These declarations, as in questions of pedigree, must not have been made *post litem motam; R. v. Cotton,* 3 *Campb.* 444; though where, in a suit as to the custom of a manor, it is attempted to give in evidence depositions in a former suit, relative to a custom of the same manor, it is no objection that the depositions taken in the former suit were *post litem motam,* if the two suits were not upon the same custom; and where the former suit is very ancient, it is unnecessary to prove by extrinsic evidence that the witnesses who made the depositions were in the situation in which they profess to stand, or that

they had the means of becoming acquainted with the customs of the manor. *Freeman v. Phillips*, 4 *Maule and S.* 486. Declarations of old persons concerning the boundaries of parishes and manors have been admitted in evidence, although the old persons were parishioners, and claimed right of common on the wastes, which their declarations had a tendency to enlarge. *Nicholls v. Parker*, 14 *East*, 331. *Plaxton v. Dare*, 10 *B. and C.* 19. So declarations on a question of parochial modus were received, though the deceased was a parishioner and liable to pay tithe. *Harewood v. Sims*, 1 *Wightw.* 112. *Deacle v. Hancock*, *M'Clel.* 85, 13 *Price*, 226, *S. C.*

Hearsay admissible when part of the transaction.] When hearsay is introduced, not as a medium of proof in order to establish a distinct fact, but as being in itself a part of the transaction in question, it is then admissible; for to exclude it might be to exclude the only evidence of which the nature of the case is capable. Thus in a case for a false representation of the solvency of A. B., whereby the plaintiffs trusted him with goods; their declarations at the time, that they trusted him in consequence of the representation, are admissible in evidence for them. *Fellowes v. Williamson*, *M. and M.* 306. So in an action against the drawer of a bill of exchange, what is said by the drawee, on the bill being presented, when due, is evidence, but what passed between the drawee and the holder afterwards is not admissible. *Prideaux v. Collier*, 2 *Stark.* 57. So declarations made by a trader, at the time of his absenting himself from home, are admissible on a question as to his bankruptcy, to show the motive of his absence. *Bateman v. Bailey*, 5 *T. R.* 512. *B. N. P.* 40. And in an action to recover money paid by a bankrupt, in contemplation of bankruptcy, his declarations as to the state of his affairs, made about the time of the transaction, but unconnected with it, are admissible for the plaintiff. *Vacher v. Cocks*, *M. and M.* 358. *Herbert v. Wilcocks*, *Id.* 355 (*n*). So answers to letters written by the bankrupt requesting assistance, may be read to prove the refusal to give assistance. *Vacher v. Cocks*, *M. and M.* 353. *See Ridley v. Gyde*, 9 *Bingh.* 349. A trader, being in embarrassed circumstances, executed an assignment of all his "effects, stock, books, and book-debts," for the benefit of his creditors. In an action after his death against the assignee, treating him as executor *de son tort*, it was held, that a list of creditors made out about the time of the execution of the assignment, by the direction of the assignor, was evidence as part of the transaction, for the purpose of disproving fraud. *Lewis v. Rogers*, 1 *Crom. M. and R.* 48, 4 *Tyr.* 872, *S. C.* So in actions of assault, evidence of what the plaintiff said immediately on receiving the hurt is admissible. *Thompson v. Trevanion*, *Skin.* 402. 6 *East*, 193. So the declarations of a plaintiff made in a conversation with the defendant, if part of

the *res gestæ*, are admissible for the plaintiff as part of his evidence. *Hayslep v. Gymer*, 1 *Ad. and Ell.* 162.

In an action for criminal conversation, the declarations of a wife at the time of her elopement, that she fled from immediate terror of personal violence from her husband, seem to be evidence against him. *See Aveson v. Kinnaird*, 6 *East*, 193. And where in a similar action the defence was, that the plaintiff had connived at his wife's elopement, evidence was received on behalf of the plaintiff, of the wife's declaration as to her intention in going. *Hoare v. Allen*, 3 *Esp.* 276; *and see Willis v. Bernard*, 8 *Bingh.* 376, *post.* In an action for breach of promise of marriage, if the defendant relies upon the general bad character of the plaintiff, a witness may be examined as to representations made to him by third persons. *Foulkes v. Selway*, 3 *Esp.* 236. Where a man was killed in consequence of having been run over by a cabriolet, it was held, on an indictment against the driver for manslaughter, that what the deceased had said immediately on receiving the injury was admissible in evidence. *R. v. Foster*, 6 *C. and P.* 325.

Ancient documents, in what cases admissible.] Where the contents of an ancient deed, or document, raise a presumption of a particular fact, evidence of such deed, or instrument, is admissible in proof of the fact. Thus, where the question was, whether certain lands within a manor were subject to a right of common, counterparts of old leases, preserved among the muniments of the lord of the manor, by which the land appeared to have been demised by the lord, free from such charge, were allowed to be evidence for the plaintiff, claiming under the lord of the manor, to prove that at the time of their respective dates, the lord had granted the land, free from common, though possession under the leases was not shown. *Clarkson v. Woodhouse*, 5 *T. R.* 412 (*n*). 3 *Dougl. S. C.* In the same manner, where the question was whether a certain place was within the limits of a hundred, ancient entries of orders of justices in sessions, stating the place to be within such limits, were held to be evidence of reputation, though the justices were not proved to have been resident within the hundred or county. *Duke of Newcastle v. Hundred of Broxstowe*, 4 *B. and Ad.* 273. So old entries of licences on the court-rolls of a manor, stating that the lords of the manor had the several fishing in the navigable river, and for certain rents had granted liberty of fishing, were held inadmissible to prove a prescriptive right in the plaintiffs, claiming under the lords of the manor, without proof of payment under the licences: but such evidence is not entitled to any weight unless it be shown that in latter times payments have been made under similar licences, or that the lords of the manor have exercised other acts of ownership which have been acquiesced in. *Rogers v. Allen*, 1 *Campb.* 309. Where the question is whether certain lands are in the parish of A. or B.

ancient leases, in which they are described as lying in parish B. are evidence of reputation that the land is in that parish *Plaxton v. Dave*, 10 *B. and C.* 17. An old deed between a public body claiming tolls and others liable thereto, regulating the amount of payment, is evidence of the existence of the tolls. *Brett v. Beales, M. and M.* 416.

Hearsay of persons having no interest to misrepresent, in what cases admissible.] What a man writes or says for himself cannot be evidence for himself or his representative. *Glyn v. Bank of England*, 2 *Ves.* 43. *R. v. Debenham*, 2 *B. and A.* 187. Therefore entries made by a deceased person, under whom the defendant claims, acknowledging the receipt of rent for the premises in question, are not admissible evidence for the defendant. *Outram v. Morewood*, 5 *T. R.* 123. So on a question whether the appointment of a curate belongs to the vicar or to a corporation, entries in old books belonging to the corporation are not evidence for them. *Attorney Gen. v. Corporation of Warwick*, 4 *Russ.* 222. So a survey of a manor made by the owner is not evidence against a stranger in favour of a succeeding owner; *Anon.* 1 *Str.* 95; but where A. seised of the manors of B. and C., causes a survey to be taken of the manor of B., which is afterwards conveyed to E., and after a long time there are disputes between the lords of the manors of B. and C. about their boundaries, this old survey may be given in evidence. *Bridgman v. Jennings*, 1 *Ld. Raym.* 734. *See Doe v. Seaton*, 4 *Nev. and M.* 81. On a question whether certain land was part of the plaintiff's estate, or of the waste of the manor, a perambulation of the manor by the lord, including the land in question, was held to be evidence, as showing an assertion of ownership by the lord, although it was not proved that any person on behalf of the plaintiff was present at the perambulation, or knew of it. *Woolway v. Rowe*, 1 *Ad. and Ell.* 114. Entries by a deceased rector, or vicar, as to the receipt of ecclesiastical dues, are admissible for his successor, on the ground that he has no interest to mis-state the fact. *Le Grose v. Lovemoor*, 2 *Gwill.* 529. *Armstrong v. Hewit*, 4 *Price*, 218. And even where the entries have been made by deceased impropriate rectors, they have been admitted as evidence for their successors, though objected to as coming from the owners of the inheritance. *Anon. Bunb.* 46. *Illingworth v. Leigh*, 4 *Gwill.* 1618. But the reception of this evidence has given rise to much observation. *See the cases cited* 1 *Phill.* 247 (*n*).

An attorney's bill with an indorsement upon it, "March 4, 1815, delivered a copy to C. D.," which indorsement is proved to be in the handwriting of a deceased clerk of the plaintiff (whose duty it was to deliver a copy of the bill), and which is proved to have existed at the time of the date, has been held to be evidence to prove the delivery of the bill. *Champneys*

v. Peck, 1 *Stark.* 404. In a late case, Best, C.J. is said to have been of opinion, that a banker's ledger was receivable in evidence, in an action between the assignees of a customer and a third party, to show that the customer at a certain time had no funds in the banker's hands. *Furness v. Cope*, 5 *Bingh.* 114.

Hearsay of persons speaking against their own interest admissible.] In a variety of cases the declarations of deceased persons, made against their own interest, have been admitted. *See the cases collected*, 2 *Russell's Rep.* 67 (*n*). And they are admissible as evidence of facts there stated, though such facts may not have been within the party's own knowledge, for the whole declaration must be taken together. *Crease v. Barrett*, 1 *Crom. M. and R.* 919. Entries by a deceased steward of money received by him from different persons, in satisfaction of trespasses committed on the waste, are admissible to prove that the right to the soil of the waste was in his master. *Barry v. Bebbington*, 4 *T. R.* 514. *Wynne v. Tyrwhitt*, 4 *B. and A.* 376. *See Dean and Chapter of Ely v. Caldecott*, 7 *Bingh.* 433. So a bill of lading signed by a deceased master of a vessel, for goods deliverable to a consignee, is evidence of property in the consignee, even in trover for the goods against a third person. *Per Lawrence, J., Haddow v. Parry*, 3 *Taunt.* 305. So also a declaration by a deceased occupier of land that he rents it under a certain person, is evidence of that person's seisin. *Uncle v. Watson*, 4 *Taunt.* 16. *Doe v. Jones*, 1 *Campb.* 367. *Davies v. Peirce*, 2 *T. R.* 53. *Doe v. Green*, *Gow*, 227. The principle is that occupation being presumptive evidence of a seisin in fee, any declaration claiming a less estate is against the party's interest. *Crease v. Barrett*, 1 *Crom. M. and R.* 931. Entries made by a deceased collector of rates, charging himself with the receipt of money, and made by him in the public books of his office, are admissible against his surety to prove the receipt. *Goss v. Watlington*, 3 *B. and B.* 132. And the same has been held with regard to the entries of a clerk. *Witnash v. George*, 8 *B. and C.* 556, 3 *M. and R.* 42, *S. C.* So entries in the land-tax collector's book, stating A. B. to be rated for a particular house, and his payment of the sum rated, are evidence to show that A. B. was occupier of the premises at the time. *Doe v. Cartwright*, *R. and M.* 62. So entries made by a deceased collector of taxes in a *private* book, charging himself with the receipt of sums of money, are evidence against a surety of the receipt of the money, though the parties who paid the money are alive and might be called. *Middleton v. Melton*, 10 *B. and C.* 317. But if the party *who made the entry* be alive, though out of the jurisdiction of the court, so that he cannot be called, the proof of the entry is inadmissible. *Stephen v. Gwennap*, 1 *Moo. and Rob.* 120. *Smith v. Whittingham*, 6 *C. and P.* 78. But in a very late case it was held, that

declarations respecting the subject matter of a suit, by a person who, at the time of making them, had the same interest in such matter as the party to the suit, are admissible in evidence against that party, though the maker of them is alive and might be called. *Woolway v. Rowe*, 1 *Ad. and Ell.* 114; *but see Doe v. Turford*, 3 *B. and Ad.* 898. It has been held by Littledale, J., that a deceased tradesman's bill for repairs, with his receipt thereupon, is not evidence of the work having been done for the person charged, although the paper is found amongst the other papers of the person charged. *Doe v. Vowles*, 1 *Moo. and Rob.* 261.

Upon the same principle, entries by a deceased shopman, or servant, in his master's books, stating the delivery of goods, are evidence for his master of such delivery. *Price v. Lord Torrington*, 1 *Salk.* 285. In order to render such entries evidence, it must appear that the shopman is dead; that he is abroad and not likely to return is not sufficient. *Cooper v. Marsden*, 1 *Esp.* 1. By stat. 7 Jac. 1, c. 12, the shop-book of a tradesman shall not be evidence in any action for wares delivered, or work done above one year before the bringing of the action, except the tradesman or his executor shall have obtained a bill of debt, or obligation of the debtor for his said debt, or shall have brought against him some action within a year next after the delivery of the wares, or the work done. *See Sikes v. Marshall*, 2 *Esp.* 705. Where the effect of the entry is not to charge the servant it is not evidence. Thus in an action for the hire of horses, an entry by the plaintiff's servant, since dead, stating the terms of the agreement with the defendant, is not evidence. *Calvert v. Archbp. of Cant.* 2 *Esp.* 646.

Hearsay of persons making entries, &c. in discharge of their duty.] Where an entry or declaration is made by a person in the course of discharging a professional or official duty, it is in general admissible, after the death of the party making it. *Doe v. Turford*, 3 *B. and Ad.* 890. *Higham v. Ridgway, supra.* But though an entry made in the course of office, reporting facts necessary to the performance of a duty, may be admissible, yet the statement in it of other circumstances, however naturally they may find a place in the narrative, is no proof of those circumstances. *Chambers v. Bernasconi*, 1 *Crom. M. and R.* 368.

ADMISSIONS.

The express admissions of a party to the suit, or admissions implied from his conduct, are strong evidence against him; but he is at liberty to prove that such admissions were mistaken or untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition; in such case the party is estopped from disputing

their truth, with respect to that person and those claiming under him in that transaction, but as to third persons he is not bound. *Per Bayley, J., Heane v. Rogers, 9 B. and C.* 586.

An acknowledgment of a party's handwriting, though made pending a treaty of compromise, is evidence against him. *Waldridge v. Kennison,* 1 *Esp.* 143. So facts admitted before arbitrators. *Gregory v. Howard,* 3 *Esp.* 113. *Doe v. Evans,* 3 *C. and P.* 219. An offer of a specific sum by way of compromise is admissible, unless accompanied with a caution that the offer is confidential. *Wallace v. Small, M. and. M.* 446; *Hill v. Elliot,* 5 *C. and P.* 436; *Watts v. Lawson, Ibid.* 447 (*n*); *but see Slack v. Buchanan, Peake,* 5. An answer to a bill in Chancery, filed against the defendant by a stranger, may be read to show the admission of a particular fact, though it is not by itself evidence of a judicial proceeding. *Grant v. Jackson, Peake,* 203. The examination of a party, signed by him, before commissioners of bankrupt, is evidence against him, though part only of his deposition was noted down. *Milward v. Forbes,* 4 *Esp.* 172. So testimony given in court, admitting a particular fact, may be used in an action against the witness, though he was prevented from entering into an explanation of the circumstances under which the fact took place, it being irrelevant. *Collett v. Lord Keith,* 4 *Esp.* 212. It was ruled in one case that an inventory exhibited by an administrator in the Ecclesiastical Court, is *primâ facie* evidence of assets to the amount stated. *Hickey v. Hayter,* 1 *Esp.* 313. But it has since been held, that the inventory exhibited for the purpose of obtaining probate, in which the executor is bound to include all the effects of the testator, whether sperate or desperate, is not to be considered such an admission as to be even *presumptive* evidence of assets. *Stearn v. Mills,* 4 *B. and Ad.* 657. An acknowledgment by a defendant that his trade is a nuisance is admissible, though not conclusive evidence against him, on an indictment for carrying on the same trade in another place. *R. v. Neville, Peake,* 91. If A., having title to premises in the possession of B., suffer B. to make alterations inconsistent with such title, it is evidence to go to the jury that A. has recognised the right of B. *Doe v. Pye,* 1 *Esp.* 364. So where, upon a building lease of 59 feet, more or less, the lessee takes sixty-two feet and a half, but the ground taken agrees with the abuttals in the lease, and the lessor sees the progress of the building without objection, this is evidence to go the jury of an acquiescence. *Neale v. Parkin,* 1 *Esp.* 229. In an action on a bill of exchange, evidence of an admission by the plaintiff, that he had no interest in the suit, is a ground of nonsuit. *MS. Archb. Pl. and Ev.* 346. So an admission by the lessor of the plaintiff in ejectment, that he had assigned his interest in the premises. *Doe v. Watson,* 2 *Stark.* 230. And in an action for a debt, evidence that the plaintiff has taken the

benefit of the Insolvent Debtors Act, and not inserted the debt in question in his schedule, is an admission of its not being due. *Nicholls v. Downes*, 1 *Moo. and Rob.* 13. Letters written by a party are evidence against him, without producing those to which such letters are answers. *Lord Barrymore v. Taylor*, 1 *Esp.* 326. It has been ruled that the contents of a written instrument cannot be proved against a party by his admission, unless the non-production of it be accounted for. *Bloxam v. Elsie*, *R. and M.* 187. But in another case Mr. Justice Parke ruled, that what a party says is evidence against himself as an admission, whether it relates to the contents of a written paper or to any thing else. *Earle v. Picken*, 5 *C. and P.* 542. Too great weight ought not to be attached to the evidence of what a party has been supposed to say, as it very frequently happens not only that the witness has misunderstood what the party has said, but that, by unintentionally altering a few of the expressions really used, he has given an effect to the statement completely at variance with what the party really did say. *Per Parke, J., ibid.* An admission, in an answer in Chancery, of the execution of a deed, is only secondary evidence, and does not supersede the necessity of proving it in the regular way. *Call v. Dunning*, 4 *East*, 53. *Cunliffe v. Sefton*, 2 *East*, 187, 188. *But see Bowles v. Langworthy*, 5 *T. R.* 366; *Doe v. Watson*, 2 *Stark.* 231. So also with regard to matters of record and judicial proceedings. *Scott v. Clare*, 3 *Campb.* 236. But this objection does not apply where the party enters into an admission with a view to the trial of the cause. 2 *Stark. Ev.* 37, 1st ed. A declaration by the payee of a note, payable on demand, (the note being then in his possession,) that he gave no consideration for it to the maker, is not admissible in an action by an indorsee against the maker, the payee being alive. *Barough v. White*, 4 *B. and C.* 325. *Smith v. De Wruitz*, *R. and M.* 212, *post.*

Admissions may sometimes be presumed from the silence of a party, when certain statements are made; but the deposition of a witness, taken in a judicial proceeding against a party, is not evidence in another proceeding against that party, on the ground that he had been present, and had not cross-examined the witness. *Melen v. Andrews*, *M. and M.* 336.

A notice signed by partners, stating that the partnership "has been dissolved," is evidence against them of the dissolution, though the partnership was by deed. *Doe v. Miles*, 1 *Stark.* 181. 4 *Campb.* 373, *S. C.*

An admission in the *recital* of a deed operates as an estoppel against all persons, parties or privies to the deed. *Bowman v. Taylor*, 4 *Nev. and M.* 264, *post*, *p.* 45.

Where a covenantor and covenantee submitted the amount of damages from a breach of covenant to arbitration, in an action on the covenant, the award (unimpeached) was held conclu-

sive as to the amount of damages. *Whitehead v. Tattersall*, 1 *Ad. and Ell.* 491.

Receipts.] The acknowledgment, in a deed, of the receipt of money, is conclusive evidence, against the party executing the deed, of such receipt. *Baker v. Dewey*, 1 *B. and C.* 704. *Rowntree v. Jacob*, 2 *Taunt.* 141. *But see Stratton v. Rastall*, 2 *T. R.* 366. But such receipt will not be conclusive, if the recitals of the deed show that the money is not paid. *Lampon v. Corke*, 5 *B. and A.* 607, 1 *D. and R.* 211, *S. C.* Nor is the receipt indorsed on the back of a deed conclusive. *Per Holroyd, J.*, 5 *B. and A.* 611. In general, a receipt not under seal, is only a *primâ facie* acknowledgment that the money has been paid; *Skaife v. Jackson*, 3 *B. and C.* 421; and therefore may be contradicted or explained. *Graves v. Key*, 3 *B. and Ad.* 318. Though it has been ruled, both by Lord Kenyon and Lord Ellenborough, that a receipt, in full of all demands, given with a knowledge of all the circumstances, is conclusive. *Bristow v. Eastman*, 1 *Esp.* 172. *Alner v. George*, 1 *Campb.* 392. As between the underwriter and the assured, the acknowledgment in the policy, of the receipt of the premium, is conclusive. *Dalzell v. Main*, 1 *Campb.* 532. If an agent employed to receive money, and bound, by his duty to his principal, from time to time to communicate to him whether the money is received or not, renders an account from time to time, which contains a statement that the money is received, he is bound by that account, unless he can show that the statement was made unintentionally and by mistake. *Per Bayley, J.*, *Shaw v. Picton*, 4 *B. and C.* 729. A receipt does not exclude parol evidence of the payment. *Per Lord Ellenborough*, *Rambert v. Cohen*, 4 *Esp.* 213. Where the plaintiff entered an account in writing of goods and cash furnished to the defendant from time to time, each page of which was authenticated by the defendant's acknowledgment in writing, of the receipt of the contents, it was held, that though such an acknowledgment in writing could not be given in evidence, *per se*, in respect of the cash items amounting to above 40*s*. in each page, for want of receipt stamps, yet that it was competent to the plaintiff to prove, that, upon calling over each article to the defendant, he admitted that he had received the same, and that the witness might refresh his memory by referring to the accounts. *Jacob v. Lindsay*, 1 *East*, 460. *And see Singleton v. Barnett*, 2 *C. and J.* 369, *ante, p.* 1.

Admissions of particular character, and admissions made in a particular character.] The *character* in which the plaintiff sues, or in which the defendant is sued, is frequently proved by the defendant's admissions. Thus, if B. has dealt with A. as farmer of the post-horse duties, it is evidence in an action by

A. against B., to prove that he is such farmer. *Radford v. Mackintosh*, 3 *T. R.* 632. *And see Peacock v. Harris*, 10 *East*, 104. So in an action for slandering the plaintiff in his profession of an attorney, the words themselves importing that the defendant would have the plaintiff struck off the roll of attornies, were held to be an admission of the plaintiff's character as attorney. *Berryman v. Wise*, 4 *T. R.* 366. *Pearce v. Whale*, 5 *B. and C.* 39. *And see Smith v. Taylor*, 1 *N. R.* 196. So an admission by a defendant that a third person has become bankrupt, (as where an auctioneer advertised for sale "the property of J. S. a bankrupt,") is evidence of the title of the assignees, in an action brought by them against the defendant. *Maltby v. Christie*, 1 *Esp.* 340; *Booth v. Coward*, 1 *B. and A.* 677; *and see post*, "*Actions by Assignees of Bankrupts.*" And such an admission is evidence on a plea denying the title of the assignees. *Inglis v. Spence*, 1 *Crom. M. and R.* 432. So where the defendant, with a view to obtaining a commission against the party, swore to an affidavit stating that he had become bankrupt. *Ledbetter v. Salt*, 4 *Bingh.* 623, 1 *M. and P.* 597, *S. C. And see Harmer v. Davis*, 7 *Taunt.* 577. So it has been held that a bankrupt, who has petitioned for his discharge under stat. 49 Geo. 3, c. 121, s. 14, cannot, in an action against his assignees, dispute the validity of the commission. *Watson v. Wace*, 5 *B. and C.* 153. *See also Clarke v. Clarke*, 6 *Esp.* 61. *Like v. Howe*, 6 *Esp.* 20. But where the admission, that he has become bankrupt, is made in the course of a transaction with third persons, the bankrupt is not thereby estopped from showing, in an action against his assignees, that he has not become bankrupt. *Heane v. Rogers*, 9 *B. and C.* 577. Nor is he precluded from disputing the commission, by surrendering, or by petitioning the Chancellor to enlarge the time for surrendering. *Mercer v. Wise*, 3 *Esp.* 219. So, as against a creditor, the merely proving a debt under the commission is not such an admission as will dispense with the regular proof of the bankruptcy. *Rankin v. Horner*, 16 *East*, 191. In the case of peace-officers, justices of the peace, constables, &c., it is sufficient to prove that they acted in those characters, without producing their appointments. *Per Buller, J., Berryman v. Wise*, 4 *T. R.* 366. So in an information against a military officer, for false musters, the returns in which he described himself to be such officer are evidence of the fact. *R. v. Gardener*, 2 *Camph.* 513. So also in an action for penalties against a collector of taxes, proof of the defendant having collected the taxes is sufficient proof of his being collector, though the appointment is by warrant under an act of parliament. *Lister v. Priestley*, *Wightw.* 67, *vide ante*, *p.* 23.

In an action by assignees of a bankrupt, admissions made by them before their appointment are inadmissible against them in their character of assignees. *Fenwick v. Thornton*, *M. and*

M. 51. In an action by a bankrupt against his assignees to try the validity of his commission, depositions of deceased persons taken under the commission and inrolled by the assignees are not evidence against them as admissions, by reason of the inrolment. *Chambers v. Bernasconi*, 1 *Crom. M. and R.* 347. An admission by one of several trustees will not bind his co-trustees. *Davies v. Ridge*, 3 *Esp.* 102. And an admission by an individual of a corporation will not bind the corporate body. *Mayor of London v. Long*, 1 *Campb.* 23.

Admissions by persons, not parties to the suit, but interested.] An admission is evidence, whether made by a nominal party who sues for the benefit of another, *Bauerman v. Radenius*, 7 *T. R.* 664, (*see Gibson v. Winter*, 5 *B. and Ad.* 96,) or by the person really interested, but not named on the record. *R. v. Hardwick*, 11 *East*, 578. Thus, on an appeal, declarations by the rated inhabitants of either parish are admissible, for they are in fact parties, though the appeal is entered in the names of the parish officers. *Ibid.* So in an action on a bond, conditioned for the payment of money to L. D., the declaration of L. D. that the defendant owes nothing is evidence. *Hanson v. Parker*, 1 *Wils.* 257. So in an action by the master of a ship for freight, brought for the benefit of the owner, the admissions of the latter are evidence. *Smith v. Lyon*, 3 *Campb.* 465. So in actions on policies, the declarations of the parties really interested. *Per Lord Ellenborough, Bell v. Ansley*, 16 *East*, 143. So in an action against the sheriff, the declarations of a party who has indemnified the sheriff are evidence against the defendant. *Duke v. Aldridge, cited* 7 *T. R.* 665. So again in trover for a deed, which the defendant admitted he detained at the request of W. R. and in the detainer of which W. R. was substantially interested, the declarations of W. R. in favour of the plaintiff's claim are admissible. *Harrison v. Vallance*, 1 *Bingh.* 45; *and see Robson v. Andrade*, 1 *Stark.* 372. But in an action for contribution, by one of several sureties in a bond, against another, the declarations of the obligee as to payments, not made at the time of payment, are inadmissible. *Dunn v. Slee, Holt*, 401.

Admissions by guardian and prochein amy.] The admissions of a guardian are not evidence against an infant who sues by his guardian. *Cowling v. Ely*, 2 *Stark.* 366; *but see James v. Hatfield*, 1 *Str.* 548. And so of the admissions of *prochein amy*. *Webb v. Smith, R. and M.* 106.

Admissions by agents.] Where a party to the suit constitutes a third person his agent, for the purpose of the admission, the admission so made is evidence. Thus if a person agrees to admit a claim, provided J. S. will make an affidavit in support

of it, such affidavit has been ruled to be conclusive. *Lloyd v. Willan*, 1 *Esp.* 178; *Stevens v. Thacker*, *Peake*, 187; *and see Whitehead v. Tattersall*, 1 *Ad. and Ell.* 491; *ante, p.* 37. But to render such an affidavit conclusive, the evidence should be very clear. *Garnett v. Ball*, 3 *Stark.* 160. So if the vendee of goods denies having received them, but adds, "If the carrier's servant says he delivered the goods, I will pay you," the answer of the servant, when applied to on the subject, may be given in evidence, after his death. *Daniel v. Pitt*, 1 *Campb.* 366 (*n*). And *quære* whether evidence of the answer is not sufficient, without calling the servant, though alive. *See Williams v. Innes*, 1 *Campb.* 364, *infra.* So where an executor refers a creditor of the testator to J. S. for information respecting the assets, the admission of J. S. is evidence, and he need not be called. *Williams v. Innes*, 1 *Campb.* 364. So where a party being applied to for payment says, "A. will pay you," an admission by A. is sufficient to bind the principal, and A. need not be called. *Burt v. Palmer*, 5 *Esp.* 145. With regard to the admissions of agents in general, the rule is this: When it is proved that A. is agent to B., whatever A. does or says, or writes, in the making of a contract, as agent of B., is admissible in evidence, because it is part of the contract which he makes for B., and which therefore binds him, but it is not admissible as the agent's account of what passes. *Per Gibbs, J., Langhorne v. Allnut*, 4 *Taunt.* 519. *See Irving v. Motly*, 7 *Bingh.* 553; *Peyton v. Gov. of St. Thomas's Hospital*, 4 *M. and* 625 (*n*). 9 *B. and C.* 725, *S. C.* Thus the declaration of a servant, employed to sell a horse, is evidence to charge the master with a warranty, if made at the time of sale; if made at any other time, the facts must be proved by the servant himself. *Helyear v. Hawke*, 5 *Esp.* 72; *and see Peto v. Hague*, 5 *Esp.* 134. *Vide post* "*Assumpsit on the warranty of a horse.*" But an admission by a servant in a transaction not relating to the business in which he is employed, is not evidence against his master. *Garth v. Howard*, 8 *Bingh.* 451, 1 *Moore and Scott*, 628, 5 *C. and P.* 346, *S. C.* The admissions of an agent not made at the time of the transaction, but subsequently, are not evidence; thus the letters of an agent to his principal, containing a narrative of the transactions in which he had been employed, are not admissible in evidence against the principal. *Ibid. Kahl v. Janson*, 4 *Taunt.* 565; *and see Fairlie v. Hastings*, 10 *Ves.* 128; *Betham v. Benson*, 1 *Gow*, 45. But a letter from an agent abroad, stating the receipt of money, coupled with the answer of the principal, directing the disposition of the money, will be evidence of the receipt by the principal. *Coates v. Bainbridge*, 5 *Bingh.* 58. It is said to have been ruled at *nisi prius*, that where A. had ordered goods of B. to be delivered to C., an acknowledgment of the receipt by C. was evidence against A.; *Biggs v. Lawrence*, 3 *T. R.* 454; but Lord Kenyon

frequently ruled the contrary; *see Bauerman v. Radenius*, 7 *T. R.* 665; 10 *Ves.* 128; in which he was followed by Lord Ellenborough. *Evans v. Beattie*, 5 *Esp.* 26; *and see Bacon v. Chesney*, 1 *Stark.* 192. The admission, by an under-sheriff, of an escape, is evidence against the sheriff; *Yabsley v. Doble*, 1 *Ld. Raym.* 190; *and see Drake v. Sykes*, 7 *T. R.* 117; and the admissions of a bailiff are evidence against the sheriff, like the statements of any other agent, when they form part of the transaction. *North v. Miles*, 1 *Campb.* 389. But the admissions of the under-sheriff are not admissible against the sheriff unless they accompany an act done, or unless they tend to charge himself, he being the real party in the cause. *Snowball v. Goodricke*, 4 *B. and Ad.* 542, 1 *Nev. and M.* 236, *S. C.* The admissions of a surveyor to a corporation, respecting a house belonging to the corporation, are admissible against the latter. *Peyton v. Governor of St. Thomas's Hospital*, 3 *C. and P.* 363. In all cases, before the admissions of an agent can be given in evidence, the fact of his agency must be proved, and evidence that the party has acted as agent in other instances, in which the principal has recognised his acts, will be evidence of a general authority. *Neale v. Irving*, 1 *Esp.* 61. *Watkins v. Vince*, 2 *Stark.* 368. It must appear that the admission was made with regard to a matter within the scope of the agent's authority. *Schumack v. Lock*, 10 *B. Moore*, 39.

Admissions by counsel or attorney.] Where, after a verdict subject to a special case, a new trial has been directed, the special case, signed by the counsel on each side, is evidence of the facts there stated. *Van Wart v. Wolley*, *R. and M.* 4. An admission "It is agreed to admit on the trial of this cause the execution of, &c." may be used on a new trial. *Elton v. Larkins*, 1 *Moo. and Rob.* 196, 5 *C. and P.* 385, *S. C.* An admission made by an attorney of one of the parties, to prevent the necessity of proving a fact on the trial, is sufficient evidence of that fact; *Young v. Wright*, 1 *Campb.* 141; as where he admits the handwriting of the attesting witness, it is sufficient proof of the execution of a deed; *Millward v. Temple*, 1 *Campb.* 375; *and see Truslove v. Burton*, 9 *B. Moore*, 64; but statements made by the attorney in the course of conversation are not admissible. *Young v. Wright*, 1 *Campb.* 150. Admissions made by the defendant's attorney respecting the plaintiff's demand (the attorney refusing to be examined) are evidence against the defendant, and proof that they were made by the attorney on the record, will be sufficient to establish his agency. *Gainsford v. Grammar*, 2 *Campb.* 9. But an admission made, in a letter written by the defendant's attorney, (who is afterwards the attorney in the cause,) before the commencement of the action, is not evidence against the defendant, without some proof of his having authorised the communication. *Wagstaff v. Wilson*, 4

B. and Ad. 339. An undertaking to appear "for Messrs. T. and M., joint owners of the sloop A.," given by the attorney on the record, is evidence of the joint ownership. *Marshall v. Cliff*, 4 *Campb.* 133.

Admissions by partner.] After *primâ facie* evidence of partnership, the declaration of one partner is evidence against his copartners; *Nicholls v. Dowding*, 1 *Stark.* 81; though the former is no party to the suit; *Wood v. Bradick*, 1 *Taunt.* 104; *but see Rooth v. Jauney*, 7 *Price*, 198; and it is evidence, though made after the dissolution of the partnership, if made as to a transaction which took place before the dissolution; *ibid.*; but not to bind his copartner as to a transaction which occurred previously to the partnership, unless a joint responsibility be proved as a foundation for the evidence. *Catt v. Howard*, 3 *Stark.* 3. Admissions made by one of several partners, after the dissolution of the partnership, are admissible to prove payment, after the dissolution, of a debt due to the partnership. *Pritchard v. Draper*, 1 *Russ. and Myl.* 191. A declaration by one of several partners, joint plaintiffs, that the goods, the subject matter of the suit, were his separate property, is evidence against all the plaintiffs; *Lucas v. Delacour*, 1 *Maule. and S.* 249; but an admission by a partner, as to a subject, not of copartnership, but of conjoint ownership in a vessel, is not binding on his copartner. *Jaggers v. Bennings*, 1 *Stark.* 64.

Admissions by wife.] In general, the admissions of the wife will not bind the husband. Thus the wife's receipt for wages earned by her is not evidence against the husband. *Hill v. Hill*, 2 *Str.* 1094; *and see Alban v. Pritchett*, 6 *T. R.* 680. But where the wife can be considered the agent of her husband, her admissions may be received as evidence against him. *Emerson v. Blonden*, 1 *Esp.* 142. *Anderson v. Sanderson*, 2 *Stark.* 204, *Holt*, 591, *S. C.* Thus in an action for goods sold and delivered at the defendant's shop, an offer made by the wife to settle the demand is admissible in evidence, she being accustomed to serve in the shop, and to transact the business in her husband's absence. *Clifford v. Burton*, 1 *Bingh.* 199, 8 *B. Moore*, 16, *S. C.* So in an action against the husband, for goods sold, an acknowledgment by the wife, (who managed the business, and generally gave orders and paid for goods,) within six years, was held sufficient to take the case out of the statute of limitations. *Palethorpe v. Furnish*, 2 *Esp.* 511, (*n*). It has been held that a jury may infer the wife's agency from the circumstance of her having been seen twice in his country house, appearing to conduct his business, with reference to the transaction in question, and on one of those occasions giving directions to the foreman. *Palmer v. Sells*, 3 *Nev. and M.* 422. Pratt, C. J., admitted the wife's declaration that

she agreed to pay four shillings per week for nursing a child, to charge the husband, it being a matter usually transacted by the women. 1 *Str.* 527. Where the conduct of the wife is in question, her declarations have been held admissible for her husband in an action against him. Thus in an action for necessaries supplied to the wife, the defence being that the husband had turned her out of doors for adultery, her declarations as to the adultery, made previously to her expulsion, were admitted by Abbott, C. J. *Walton v. Green,* 1 *C. and P.* 621.

Admissions by payment of money into court.] The practice of paying money into court is now altered by the rule of H. T., 4 W. 4, (17,) which directs that such payment shall in all cases be pleaded, and gives the form of plea. The object of this rule was that the admission of the plaintiff's right of action, and the extent of that admission, might appear on the record. *See the report of C. L. Commissioners referred to,* 4 *Nev. and M.* 5 (*n*). In other respects it leaves the effect of the payment into court the same as before, and the former authorities are still applicable. The effect of payment of money into court is the same as of payment of money before action brought. *Meager v. Smith,* 4 *B. and Ad.* 673, 1 *Nev. and M.* 449, *S. C.* Payment of money into court by the defendant, is an admission that the plaintiff has a legal demand to the extent of the money brought in; *Blackburn v. Schoole,* 2 *Campb.* 341; but not beyond that extent; therefore payment of money into court in an action on a promissory note payable by instalments, is only an admission that money to the amount paid in was due on the note, and does not bar the statute of limitations as to a further sum claimed on the same note. *Reid v. Dickens,* 5 *B. and Ad.* 499. So the payment into court upon a count on a valued policy, in which the loss is averred to be total, is no admission of a total loss. *Rucher v. Palsgrave,* 1 *Campb.* 557, 1 *Taunt.* 419, *S. C.* Where there is a special contract, the payment into court admits that contract; but where, as in the common *indebitatus assumpsit,* the demand is made up of several distinct items, the payment admits no more than that the sum paid in is due. *Per Gaselee, J., Seaton v. Benedict,* 5 *Bingh.* 32. It is a conclusive admission of the character in which the plaintiff sues; *Lipscombe v. Holmes,* 2 *Campb.* 441; and when the money is paid into court in *indebitatus assumpsit* for work and labour, and the work was done under *one contract,* the defendant is precluded from objecting that another person ought to have been joined as co-plaintiff. *Walker v. Rawson,* 1 *Moo. and Rob.* 250. So where in an action of contract all the defendants pay money into court, they are precluded from setting up the defence that one of them was not a party to the contract. *Ravenscroft v. Wise,* 1 *Crom. M. and R.* 203. It is an admission of the plaintiff's right to sue in the

court in which the action is brought. *Miller v. Williams*, 5 *Esp.* 19. In an action on a bill of exchange, it admits the handwriting of the parties; *Gutteridge v. Smith*, 2 *H. B.* 374; and the sufficiency of the stamp. *Israel v. Benjamin*, 3 *Campb.* 40. In an action on a guarantee, the payment of money into court, on a plea of tender, admits an agreement signed according to the statute of frauds. *Middleton v. Brewer*, *Peake*, 15. In an action of covenant, it admits the execution of the deed; *Randal v. Lynch*, 2 *Campb.* 356, 357; and where two breaches are assigned in one count, payment into court on one of the breaches is an admission of the whole contract, as set out in that count, so as to enable the plaintiff to recover on the second breach without proof of the contract. *Dyer v. Ashton*, 1 *B. and C.* 3. It admits a contract for goods sold and delivered, where the goods were tortiously converted by the defendant, and the plaintiff has declared for goods sold and delivered. *Bennet v. Francis*, 2 *B. and P.* 550, 4 *Esp.* 28, *S. C.* In an action for goods sold by sample at a stipulated price, after payment of money into court, the defendant cannot insist on the inferiority of the goods. *Leggatt v. Cooper*, 2 *Stark.* 103. Where the declaration states a contract to pay a particular sum of money for certain articles, payment of part of the money into court, by admitting the contract, admits also the sum originally due; and the only question is, whether the remainder of the money had been previously paid; *Cox v. Brain*, 3 *Taunt.* 95, 2 *B. and A.* 118; but where the declaration is for goods sold, to be paid for at the average price, to be ascertained on a day specified, payment into court does not admit the average price to be as stated in the declaration; *Stoveld v. Brewer*, 2 *B. and A.* 116; *see also Everth v. Bell*, 7 *Taunt.* 450; and where the defendant declared specially upon a promise in writing to pay "his proportion" (without specifying it) of a debt barred by the statute of limitations, and averred the amount of the proportion under a *videlicet*, it was held that payment into court on that count did not admit the amount of the proportion. *Lechmere v. Fletcher*, 1 *Crom. M. and R.* 623, 3 *Tyr.* 450, *S. C.* Payment of money into court on several counts, one of which only is applicable to the plaintiff's demand, admits a cause of action on that count only. *Per Best, C. J., Stafford v. Clark*, 2 *Bingh.* 383. In an action against a carrier for not carrying goods safely, if the defendant has restricted his liability by a notice that he will not be accountable for more than 5*l.* (unless entered and paid for accordingly), the payment of 5*l.* into court does not admit a liability beyond that sum. *Clark v. Gray*, 6 *East*, 570; *Yate v. Willan*, 2 *East*, 128; *and see* 1 *Phill. Ev.* 178. Where the defendant pleads the general issue, and the statute of limitations, and pays money into court generally, such payment does not take the case out of the statute. *Long v. Greville*,

3 *B. and C.* 10. If the plaintiff declares on an illegal contract, the defendant cannot give it validity by his admission; and if money is paid into court generally, and the plaintiff insists on several claims, some legal and others illegal, the court will apply the payment to the legal claim. *Ribbans v. Crickett*, 1 *B. and P.* 264. If the plaintiff misleads the defendant, and induces him to suppose that the only point to be tried is a question of fraud, the court will not permit him to take advantage of the payment of money into court, so as to exclude evidence of the fraud. *Muller v. Hartshorn*, 3 *B. and P.* 556.

If the defendant pays money into court on an instrument bearing interest, and pays the interest only up to the commencement of the action, the plaintiff may proceed for the interest up to the time of payment into court. *Kidd v. Walker*, 2 *B. and Ad.* 705.

The rule of T. T. 1 W. 4, (2 *B. and Ad.* 788), as to annexing the particulars of the plaintiff's demand to the declaration, has not altered the effect of the payment of money into court. *Meager v. Smith*, 4 *B. and Ad.* 673, 1 *Nev. and M.* 449, *S. C.*

Admissions by recital.] A recital in a deed is evidence against him who executed the deed, or any person claiming under him. *Com. Dig. Evid.* (*B.* 5), *and see Rees v. Lloyd*, *Wightw.* 123. And such recital operates as an estoppel. *Bowman v. Taylor*, 4 *Nev. and M.* 264. Thus the recital of a lease, in a release, is evidence of the lease against the releasor and those claiming under him. *Ford v. Grey*, 1 *Salk.* 286; *Crease v. Barrett*, 1 *Crom. M. and R.* 919; *but see Peake, Ev.* 108, 5th edit. So in trespass against a sheriff, a bill of sale reciting the writ, the taking, and the sale of the goods, is evidence against him of those facts. *Woodward v. Larking*, 3 *Esp.* 286. So the recital of an ancient charter, in a modern charter, is evidence. *Per Abbott, J.*, *Gervis v. the Grand Western Canal Comp.* 5 *M. and S.* 78. The recitals in a deed may confine the effect of other admissions in the same instrument. *Lampon v. Corke*, 5 *B. and A.* 607, 1 *D. and R.* 211, *S. C.* The recital in a bond that the parties had agreed to execute a bond in the sum of 500*l.*, will not confine the bond to that sum if actually executed in the penal sum of 1000*l.* *Ingleby v. Swift*, 10 *Bingh.* 84, 3 *Moore and S.* 488, *S. C.*

Admissions on the record.] Whatever is admitted on the record need not be proved, and cannot be disproved; *B. N. P.* 298; but an admission as to one of several issues, does not operate as an admission to any other. *Harrington v. Macmorris*, 5 *Taunt.* 228. Whatever is pleaded and not denied, shall be taken to be admitted. *Wimbish v. Tailbois, Plow.* 48. Thus

if the defendant in replevin avow the taking of the cattle, damage feasant, in the *locus in quo* as parcel of the manor of K., and the plaintiff make title to the manor of K., and traverse that the manor is the freehold of the defendant, he cannot afterwards prove that K. is no manor, for that is admitted by the traverse. *B. N. P.* 298. If the defendant in covenant do not plead *non est factum,* the execution of so much of the deed as is expanded on the record is admitted; but if the plaintiff wish to avail himself of any other part of the deed, he must prove it by the attesting witness in the usual way. *Williams v. Sills*, 2 *Campb.* 519. Even before the late rules, in an action by an executor or administrator, on a cause of action arising in the lifetime of the testator or intestate, a plea of the general issue admitted the title of the plaintiff to sue as executor or administrator. *Marsfield v. Marsh*, 2 *Ld. Raym.* 824, *Thynne v. Protheroe*, 2 *M. and S.* 553. But where the cause of action arose in the time of the executor or administrator the general issue did not admit his title, and the plaintiff must have proved it. Thus where the plaintiff declared in trover upon a possession by his testator, and a conversion in his own time, pleading the general issue did not admit his title as executor. *Hunt v. Stevens*, 3 *Taunt.* 113; *but see Watson v. King*, 4 *Campb.* 272. But now by R. H. T. 4 W. 4, "in all actions by and against assignees of a bankrupt, or executors or administrators, or persons authorized by act of parliament, to sue or be sued as nominal parties, the character in which the plaintiff or defendant is stated on the record to sue or be sued, shall not in any case be considered in issue unless specially denied." The plea of the general issue admitted only such a title as is stated in the declaration, and therefore where profert was made of letters of administration which did not establish the plaintiff's claim to recover in the action, the plea of the general issue did not admit the title of the plaintiff so far as to enable him to recover. *Adams v. Savage*, 6 *Mod.* 134. In an action by husband and wife, the plea of the general issue admits the marriage. *B. N. P.* 20. Where, in trespass, the defendant pleads an entry to abate a nuisance, and the plaintiff new assigns unnecessary violence, the nuisance is admitted, and the plaintiff cannot go into evidence to negative it. *Pickering v. Rudd*, 1 *Stark.* 56, 4 *Campb.* 219, *S. C.* A plea of set-off stated, that the plaintiff made his promissory note payable to A. C., and that A. C.'s administrator indorsed it to the defendant. Replication, that the supposed cause of set-off did not accrue to the defendant within six years. It was held, that the replication admitted the making of the note and the indorsement, and that the defendant might avail himself of a memorandum of the payment of interest written on the note by A. C., (before Lord Tenterden's act), to bar the statute of limitations.

Gale v. *Capern*, 1 *Ad. and Ell.* 102. A demurrer to a bill in equity does not admit the facts, so as to be evidence against the defendant in another action between the same parties. *Tomkins v. Ashby, M. and M.* 32.

Suffering a judgment by default is an admission on the record of the cause of action. Thus in an action against the acceptor of a bill, the defendant, by suffering judgment, admits a cause of action to the amount of the bill. *Greene v. Hearne*, 3 *T. R.* 301. So in an action on a contract, the defendant cannot, after a judgment by default, insist upon the fraud of the plaintiff. *East India Company v. Glover*, 1 *Str.* 612. But where an action is removed by *habeas corpus* from an inferior court, after judgment by default, that judgment is not evidence against the defendant in the superior court. *Bottings v. Firby*, 9 *B. and C.* 762. So a demurrer admits the facts; and on a writ of inquiry, after judgment for the plaintiff, the amount of the damages is the only question. *De Gaillon v. L'Aigle*, 1 *B. and P.* 368. *Stephens v. Pill*, 2 *Dowl. P. C.* 629.

Whole admission to be taken together.] The whole of an admission must be taken together, and therefore where an account rendered by the defendant is produced to establish the plaintiff's demand, it is evidence to prove both the debtor and creditor side of the account. *Rundle v. Blackburn*, 5 *Taunt.* 245. *Thomson v. Austin*, 2 *D. and R.* 361. *Fletcher v. Froggatt*, 2 *C. and P.* 569. The assertion of a party in a conversation, given in evidence against him, of facts in his favour, is evidence for him of those facts. *Smith v. Blandy, R. and M.* 257. But though the defendant is entitled to have the whole of the particular entry in a book read, yet he cannot insist upon reading distinct entries in different parts of the book. *Catt v. Howard*, 3 *Stark.* 6. *See also Remmie v. Hall, Mann. Index*, 376. *Roe v. Ferrars*, 2 *B. and P.* 548. The two parts of an admission are not necessarily entitled to equal credit; the jury may believe one and reject the other. *R. v. Clewes*, 4 *C. and P.* 225.

Admissions, compulsory.] An admission made in the course of an examination under compulsory process, as before commissioners of bankrupt, is evidence against the party making it. *Robson v. Alexander*, 1 *B. and P.* 448. *Smith v. Beadnell*, 1 *Campb.* 30. *Stockfleth v. De Tastet*, 4 *Campb.* 10. So upon compulsory process from the House of Commons. *R. v. Merceron*, 2 *Stark.* 366. But if the party was imposed upon when he signed the examination, or was under duress, he will not be bound by it. *Per Ld. Ellenborough, Stockfleth v. De Tastet*, 4 *Campb.* 4; *and see Tucker v. Barrow*, 7 *B. and C.* 623, 1 *Man. and R.* 518, *S. C, and Rosc. Dig. Crim. Evid.* 36, 45.

OBJECT OF EVIDENCE.

The object of evidence is to prove the point in issue between the parties, and, in doing this, there are three rules to be observed: 1. That the evidence be confined to the point in issue, 2. That the substance of the issue only need be proved; and, 3. That the affirmative of the issue is to be proved, by the party asserting it.

EVIDENCE CONFINED TO THE ISSUE.

Where the evidence is referrible to the point in issue it will not be inadmissible, although it may incidentally apply to another person or thing with regard to whom or to which it is inadmissible. Thus in *crim. con.* a letter showing the state of the wife's feelings will not be rejected, although it state a fact, which it is not evidence to prove. *Willis v. Bernard*, 8 *Bingh.* 376. *See also Manning v. Clement*, 7 *Bingh.* 362.

Surplusage.] Where an averment may be wholly rejected as surplusage, it need not be proved, as the proof of it would not tend to the decision of the point in issue. The rule with regard to the proof of averments is, that if the whole of an averment may be struck out, without injuring the plaintiff's right of action, it is not necessary to prove it; but it is otherwise, if the whole cannot be struck out, without getting rid of a part essential to the cause of action: for there, though the averment be more particular than it need have been, the whole must be proved, or the plaintiff cannot recover. *Per Lawrence J., Williamson v. Allison*, 2 *East*, 452. Thus where the plaintiff, in an action on a warranty of goods, alleged that the defendants *knew* the goods to be unfit for sale, it was held, that the allegation of knowledge, being immaterial, need not be proved. *Ibid.* So in an action against a person for not obeying a *subpœna*, the allegation that the *subpœna was shown* to the defendant may be rejected. *Mullett v. Hunt*, 1 *Crom. and M.* 752.

But, where the plaintiff, in an action against the sheriff for taking the tenant's goods in execution, without leaving a year's rent, stated the terms of the tenancy with more particularity than was necessary, it was held that they must be proved as laid. *Bristow v. Wright, Dougl.* 640, 665.

Evidence of collateral facts, when admissible.] In general, evidence of collateral facts is not admissible. Thus where the question was as to the quality of beer to be furnished by the

plaintiffs to the defendant, it was held that evidence could not be admitted of the quality of beer supplied by the plaintiff to other persons. *Holcombe v. Hewson*, 2 *Campb.* 391. But where a collateral fact is material to the proof of the issue joined between the parties, evidence of such fact is admissible. Thus, in order to prove that the acceptor of a bill knew the payee to be a fictitious person, or that the drawer had a general authority from him to fill up bills with the name of a fictitious payee, evidence may be adduced to show that he had accepted similar bills before they could, according to their date, have arrived from the place of date. *Hunter v. Gibson*, 2 *H. Bl.* 288. But, in an action against the acceptor of a bill, who defends on the ground of forgery, evidence that the person suspected of the forgery has forged the defendant's name in other instances is inadmissible. *Balutti v. Serani*, *Peake*, 142. *Graft v. Lord Brownlow Bertie, MS. Peake Ev.* 111; *Viney v. Barss*, 1 *Esp.* 293. Where the object of the evidence is to show the *knowledge* of the party with regard to the nature of a particular transaction, evidence of his having been engaged in other transactions of the same kind is admissible; thus, in the various cases of forgery and coining, proof that the prisoner has passed other forged notes, or other counterfeit coin, is constantly admitted. *See Rosc. Dig. Crim. Evid.* 58, 66. So also upon questions of *intent*, evidence of other transactions is admissible. *Id.* 71. Proof of a customary right, in a particular manor or parish, is no evidence as to the customary rights in an adjoining parish or manor; *Duke of Somerset v. France*, 1 *Str.* 661; but where all the manors, in a particular district, are held under the same tenure, and a question arises in one of the manors, as to an incident to the tenure, evidence may be given of the usage prevailing in any other of the manors within the district. *Ibid. Champian v. Atkinson*, 3 *Keb.* 90; *R. v. Ellis*, 1 *Mau. and S.* 662. So where, in each of several manors, belonging to the same lord, and part of the *same district*, it appeared that there was a class of tenants answering one and the same description, and to whom tenements were granted by similar words, it was held that evidence of the rights enjoyed by those tenants in one manor might be received to show what were their rights in another. *Rowe v. Brenton*, 8 *B. and C.* 758. And where the question was whether a slip of land between some old inclosures and the highway was vested in the lord of the manor or the owner of the adjoining freehold, it was held that evidence might be received of acts of ownership by the lord of the manor, on similar slips of land not adjoining his own freehold, in various parts of the manor. *Doe v. Kemp*, 7 *Bingh.* 332. Where the question was as to the right to certain trees growing in a woody belt of considerable extent, entire and undivided, evidence was admitted of several acts of ownership in different parts of the belt; *Stanley v. White*, 14 *East*, 332; but

in trespass by the proprietors of a canal, it was held, that evidence of acts of ownership, by the proprietors, on other parts of the banks than those in question, was not admissible to prove property, without showing them to be part of *one entire district*, or that they had belonged to one person. *Hollis v. Goldfinch*, 1 *B. and C.* 205, *and see Tyrwhitt v. Wynne*, 2 *B. and A.* 554. In an action by a rector for tithes, where the question is, whether a modus exists, of a certain sum of money, for a particular farm in a township within the parish, and the ecclesiastical and parliamentary surveys are silent as to any township or farm modus, after proof by the defendant of a uniform payment in lieu of tithes, the plaintiff may inquire whether other farms in the same township are not subject to the same payment, for the purpose of showing that such payments cannot be a modus, consistently with the evidence previously adduced. *Blundell v. Howard*, 1 *Mau. and S.* 292. 1 *Phill. Ev.* 164. So proof of the manner in which a particular trade is carried on at one place is evidence as to the course of that particular trade in another place. *Noble v. Kennoway*, 2 *Dougl.* 510. Upon a question of skill and judgment evidence may be given of facts, which although in other respects collateral, are, by means of the skill and judgment of the witness, connected with, and tend to elucidate the issue. *Folkes v. Chad*, 1 *Phill. Ev.* 276, 3 *Dougl.* 157, *S. C.*

Evidence of special damage.] Where the special damage sustained by the plaintiff is not stated in the declaration, it is not one of the points in issue, and evidence of it cannot be received. But a damage which is the necessary result of the defendant's breach of contract may be proved, although not alleged in the declaration. *See Ward v. Smith*, 11 *Price*, 19. Special damage must be stated with certainty. Thus, where in an action for an irregular distress, it was averred that the plaintiff, in consequence of the injury, had lost divers lodgers, without naming any, Lord Ellenborough rejected evidence of the damage, because the names of the lodgers were not specified. *Westwood v. Cowne*, 1 *Stark.* 172. Where it was alleged as special damage that the plaintiff lost her marriage with J. N., Holt, C.J., refused to let evidence be given of a loss of marriage with any other person. *Martin v. Henrickson*, 2 *Ld. Raym.* 1007; *and see post "Case for Defamation."* Where a declaration for false imprisonment alleged that the plaintiff had been forced and obliged to pay, and *had paid* C., his attorney, a certain bill of costs, and in fact he had not paid the bill, it was held that he could only recover such part of the bill as the attorney himself had paid, which might be considered as paid by the plaintiff himself. He should, as it seems, have stated that he had *become liable to pay*. *Pritchet v. Boevey*, 1 *Crom. and M.* 775, 3 *Tyr.* 949, *S. C.*

Evidence of character.] In general, evidence as to the character of either of the parties to a suit is inadmissible, it being foreign to the point in issue. Thus, in an action for slander, imputing dishonesty to the plaintiff, he cannot adduce evidence, in the first instance, of good character. *Cornwall v. Richardson, R. and M.* 305. So also it has been held, that the plaintiff in an action for crim. con. or seduction, cannot give evidence of the good character of the wife or daughter, until evidence has been offered on the other side to impeach it; *Bamfield v. Massey*, 1 *Campb.* 460; and, if such evidence be not general, but go only to a specific instance, it has been ruled, that the plaintiff cannot, in reply, give evidence of general character, but must be restricted to the disproving of the specific instance. *Ibid. but see* 2 *Phill.* 205. 2 *Stark. Ev.* 371. Where the cross-examination of the plaintiff's witnesses has been directed to impeach the character of the plaintiff, and the witnesses deny the imputation intended, proof of the plaintiff's good character is not admissible. *King v. Francis*, 3 *Esp.* 116. *See Bate v. Hill*, 1 *C. and P.* 100.

But evidence of the party's bad character is admitted in some actions, with a view to the amount of damages. Thus, in actions of crim. con. evidence is admissible of the wife's bad character for chastity, and even of particular acts of adultery committed by her before her intercourse with the defendant; for, by bringing the action, the husband puts her general behaviour in issue. *B. N. P.* 27, 296. So of the husband's profligacy, and of his criminal connection with other women. *Ibid.* So in slander, it was formerly held, that where the defendant does not justify, evidence might be given of the plaintiff's bad character, as that at the time of the supposed offence, the plaintiff was generally suspected of the crime imputed to him; —— *v. Moor*, 1 *Mau. and S.* 284, *Lord Leicester v. Walter*, 2 *Campb.* 251; but it has since been decided, that general evidence, in this action, of the plaintiff's bad character, is inadmissible in mitigation of damages. *Jones v. Stevens*, 11 *Price*, 235. *See further as to the character of witnesses post.*

Particulars of plaintiff's demand.] Where the plaintiff has delivered a bill of the particulars of his demand, he will be precluded from giving any evidence of demands not contained in his particular. Thus, where the particular states a demand for horses sold by the plaintiff to the defendant, evidence cannot be given of money due from the defendant for horses sold by him as the plaintiff's agent. *Holland v. Hopkins*, 2 *B. and P.* 243. But in an action against an agent for not accounting for goods delivered to the plaintiff to be sold, and for goods sold, and money had and received, particulars headed "A. to B. —— tierces of porter, &c. £.——" and containing also items for money had and received, were held to

be applicable to any of the counts in the declaration. *Hunter v. Welsh*, 1 *Stark*. 224. So in an action by a carrier, who had misdelivered certain goods to the defendant, which the latter appropriated to his own use, the carrier having paid the amount of the goods to the real owner, it was held that he might recover on the count for money paid, although his particulars were only "To seventeen firkins of butter, 55*l.* 6*s.*" *Brown v. Hodgson*, 4 *Taunt*. 189. Proof that the defendant acknowledged that he owed the plaintiff 13*l.* 10*s.* will not support particulars "To a beast sold and delivered, 13*l.* 10*s.*" *Breckon v. Smith*, 1 *Ad. and Ell.* 488. Where the particulars contained a demand on a promissory note only, which could not be given in evidence for want of a stamp, it was held, that the plaintiff could not give evidence of the consideration of the note. *Wade v. Beasley*, 4 *Esp*. 7. Where a particular need not be given as to some counts, the omission of those causes of action will not be material. Thus, where the first count was on a bill of exchange for 40*l.*, and the second on a bill for 20*l.*, and the third for goods sold, and the particulars specified only the 20*l.* bill and the goods, *per Abbott, C. J.*; "That is no objection. If the bill is specified in the declaration it need not be mentioned in the particulars. You must give a particular of goods sold, but you never need give a particular of bills of exchange, if they appear in the declaration." *Cooper v. Amos*, 2 *C. and P*. 267. *Day v. Davies*, 5 *C. and P*. 340. The plaintiff may recover interest, though the particular contains only a demand upon a promissory note. *Blake v. Lawrence*, 4 *Esp*. 147. In one case, it was ruled that the plaintiff might recover more than his particulars demanded, the defendant having given in evidence an account, from which it appeared that there was a sum of money due to the plaintiff beyond that claimed in his particulars. *Hurst v. Watkis*, 1 *Campb*. 68, *and see* 1 *Phill. Ev*. 182. Where the defendant pleaded in abatement, that the promises were made by himself and another person jointly, and it appeared from the particulars, and was admitted at the trial, that some of the articles were furnished to the defendant, jointly with the person named in the plea, it was held by Lord Kenyon, that the plaintiff was bound by his particulars, and that he must be nonsuited, although it appeared by the particulars that part of the demand was due from the defendant alone. *Colson v. Selby*, 1 *Esp*. 451. But where, in an action for lottery-tickets sold, the particulars of the defendant's set-off mentioned the sale of the tickets to himself, it was held that this was not sufficient proof of the sale, and that the fact must be proved by other evidence. *Miller v. Johnson*, 2 *Esp*. 602. *Harington v. Macmorris*, 5 *Taunt*. 229. Yet, in a very late case, the particulars of the plaintiff's demand were allowed to be read for the defendant, in order to prove payments for which the plaintiff had given the

defendant credit. *Rymer v. Cook, M. and M.* 86 (*n*). The plaintiff may give evidence of a demand contained in his particulars, though he omitted to include it in a bill delivered before action brought. *Short v. Edwards,* 1 *Esp.* 374.

A mistake in the particulars, not calculated to mislead, is immaterial. Thus, where the particulars specified a bill for 60*l.* bearing date on a certain day, and the evidence was of a bill for 63*l.* dated on a different day in the same year and month, Abbott, J., held the variance to be immaterial. *Manning's Index,* 240. *Green v. Clarke,* 2 *Dowl. P. C.* 18. So where the particulars specify a payment made on account of the defendant to A., which was in fact made to B., it is sufficient, unless the defendant will state to the Court by affidavit that he has been misled. *Day v. Bower,* 1 *Campb.* 69 (*n*). So where the action is for money had and received to the use of the bankrupt, and the particulars for money had and received to the use of the plaintiffs, as assignees. *Tucker v. Barrow, M. and M.* 137. So also where work and labour is stated to have been performed in a certain month, which was in fact performed in another month, it is immaterial. *Millwood v. Walter,* 2 *Taunt.* 224. *Harrison v. Wood,* 8 *Bingh.* 371. So again, where in debt for rent, premises situate at A. are described as situate at B., it is immaterial, unless the defendant can prove that he held other premises at B. of the plaintiff. *Davies v. Edwards,* 3 *Mau. and S.* 380. *Disbursements* have been held to be recoverable under particulars "for cash advanced." *Harrison v. Wood,* 8 *Bingh.* 371. And particulars in which the plaintiffs claim for goods sold as *Brewers,* will not prevent their recovering as spirit dealers, where the defendant has not been misled. *Lambirth v. Roff,* 8 *Bingh.* 411. If the plaintiff, perceiving a defect in his particulars, delivers a second bill of particulars, large enough to comprehend his whole demand, yet this will not avail him, unless the second particulars have been delivered under a judge's order, and he will be confined to his first particulars. *Brown v. Watts,* 1 *Taunt.* 353.

The particulars were formerly proved by the production of the judge's order, and of the particulars themselves, and by proof of the signature of the party, or his attorney or agent. 1 *Phill. Ev.* 183. But now since the rule of T. 1 W. 4, (6), which directs that a copy of the particulars of demand and also (if any) of the defendant's set-off, shall be annexed by the plaintiff's attorney to every record at the time it is entered with the judge's marshal, the particulars being so annexed, it is not necessary to prove the delivery of them. *Macarthy v. Smith,* 8 *Bingh.* 145.

Evidence confined to the issue—of what facts the courts will take judicial notice.] There are various facts which the courts

will notice judicially, and of which it is of course unnecessary to give any evidence. They will judicially notice the order and course of proceedings in Parliament; *Lake v King*, 1 *Saund.* 131; the superior courts and their jurisdiction; *Tregany v. Fletcher*, 1 *Ld. Raym.* 154; and course of proceeding; *Dobson v. Bell*, 2 *Lev.* 176; and the privileges of their officers; *Ogle v. Norcliffe*, 2 *Ld. Raym.* 869; the beginning and end of term; *Estwick v. Cooke*, 2 *Ld. Raym.* 1557; 1 *Saund.* 300, *d* (*n*). 5*th ed.*; general customs, as those of gavelkind and borough-English; *Clements v. Scudamore*, 2 *Ld. Raym.* 1025; the limits of ecclesiastical jurisdictions; *Adams v. Terretenants of Savage*, 2 *Ld. Raym.* 854; the limits of counties; 2 *Inst.* 557; *Deybel's case*, 4 *B. and A.* 248; the days of festivals appointed by the calendar; *Brough v. Perkins*, 6 *Mod.* 81; and the number of days in a particular month. 1 *Rol. Ab.* 524.

The courts will not notice judicially the nature and jurisdiction of inferior courts; *Moravia v. Sloper*, *Willes*, 37; nor foreign laws; *Mostyn v. Fabrigas*, *Cowp.* 174; nor the seal nor proceedings of a foreign court; *Henry v. Adey*, 3 *East*, 221; *Ganer v. Lady Lanesborough*, *Peake*, 17; nor the laws of the colonies; *Wey v. Yally*, 6 *Mod.* 194; nor the king's proclamation, without production of the Gazette; *Van Omeron v. Dowick*, 2 *Campb.* 44; nor particular customs, as those of London; *Argyle v. Hunt*, 1 *Str.* 187, *Wiseman v. Cotten*, 1 *Sid.* 138; nor that a particular town is within a certain diocese; *R. v. Sympson*, 2 *Ld. Raym.* 1379; nor the local situation of a town in a county; *Deybel's case*, 4 *B. and A.* 243; nor that a particular town, as Dublin, is in Ireland; *Kearney v. King*, 2 *B. and A.* 303; nor the sheriff's book. *Russell v. Dickson*, 6 *Bingh.* 442. Though the court will take judicial notice of the articles of war which are printed by the King's printer; *Bradley v. Arthur*, 4 *B. and C.* 304, *R. v. Withers*, *cited* 5 *T. R.* 446; yet the book called "Rules and Regulations for the Government of the Army," will not be judicially noticed. *Bradley v. Arthur*, 4 *B. and* C. 304.

THE SUBSTANCE OF THE ISSUE ONLY NEED BE PROVED.

The substance of the issue joined between the parties need alone be proved. 1 *Phill. Ev.* 190. Thus, on a count against a sheriff for a voluntary escape, the plaintiff may prove a negligent escape. *Bonafous v. Walker*. 2 *T. R.* 126. So on a count on a policy for a total loss, he may prove a partial loss. *Gardiner v. Croasdale*, 2 *Burr.* 904. So if a plea in trespass allege two matters, either of which amounts to a justification, proof of one of them is sufficient, though they are both put in issue

by the replication. *Spilsbury v. Micklethwaite*, 1 *Taunt.* 146. In an action on a bond, the condition of which is, that the obligor will not cut down any trees, if the plaintiff assigns a breach, that the obligor cut down twenty trees, he may prove that part of that number only were cut down. *Co. Litt.* 282 (*a*). In slander, the plaintiff is entitled to a verdict on proof of some of the actionable words laid. *Compagnon v. Martin*, 2 *W. Bl.* 790. In replevin, the defendant, who avows for rent arrear, is entitled to a verdict, though he prove less to be in arrear than he has alleged. *Harrison v. Barnby*, 5 *T. R.* 248. When an averment is divisible, it is sufficient to prove one part of it. Thus, where in a declaration for a false return to a *fi. fa.* against the goods of A. and B., it was alleged that A. and B. had goods within the bailiwick, it was held sufficient to prove that either A. or B. had goods. *Jones v. Clayton*, 4 *Mau. and S.* 349.

The doctrine of variances in general depends upon the rule that the substance of the issue only need be proved.

Variance—amendment.] By late acts, the court has the power of ordering the record to be amended in case of variance. By 9 Geo. 4, c. 15, it is enacted, that it shall and may be lawful for every court of record, holding pleas in civil actions, any judge sitting at Nisi Prius, and any court of oyer and terminer, and general gaol delivery in England and Wales, the town of Berwick-upon-Tweed, and Ireland, if such court or judge shall see fit to do so, to cause the record on which any trial may be pending before any such judge or court, in any civil action, or in any indictment or information for any misdemeanor, when any variance shall appear between any matter in writing or in print, produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular by some officer of the court, on payment of such costs, if any, to the other party, as such judge or court shall think reasonable, and thereupon the trial shall proceed as if no such variance had appeared; and in case such trial shall be had at Nisi Prius, the order for the amendment shall be indorsed on the postea and returned together with the record, and thereupon the papers, rolls, and other records of the court from which such record issued, shall be amended accordingly. *See Webb v. Hill, M. and M.* 253, *stated post.* This act should receive a construction as liberal as the words will admit. *Per Tindal, C. J.*, *Masterman v. Judson*, 8 *Bingh.* 230. Where a judgment is stated in the record as of one court, and it appears by the production of an examined copy to have been obtained in another, the judge may order the record to be amended under the above statute. *Briant v. Eicke, M. and M.* 359. So where in an

action for not obeying a *subpœna* the declaration stated that the plaintiff caused to be left with the defendant *a copy of the writ of subpœna*, Lord Tenterden allowed this allegation to be amended as follows "a copy of *so much* of the said writ of subpœena *as related to the said defendant.*" *Masterman v. Judson*, 8 *Bingh.* 224. Where in replevin the defendant avowed for rent arrear, and on production of the lease it varied from the terms of the tenancy stated in the avowry, Parke, J., refused to permit an amendment under this statute, observing, that it only applied to cases where some particular written instrument was professed to be set out or recited. *Ryder v. Malbon*, 3 *C. and P.* 594. This decision may be doubted, for in order to bring the case within the act, it has been decided by the Court of King's Bench, that it is not necessary that the declaration should state the agreement, &c., to be in writing. *Lumey v. Bishop*, 4 *B. and Ad.* 479. Where certain words had been added to an acceptance of a bill, obviously after the bill was accepted, and the declaration stated the acceptance with the addition of these words, Lord Tenterden refused an amendment, saying that it was not one of those cases where there had been a verbal mistake in setting out some written document. *Jelf v. Oriel*, 4 *C. and P.* 22, *and see Rutherford v. Evans*, *Id.* 79. Where the declaration against the acceptor of a bill mis-stated the date of a bill, Parke, J., allowed an amendment *without costs*. *Bentzing v. Scott*, *Id.* 24. So a variance in the name of the *payee* of a bill, in an action by indorsee against indorser, may be amended. *Parks v. Edge*, 1 *Crom. and M.* 429.

A judge cannot amend under the statute, unless a writing is produced in evidence by which an amendment may be made. Therefore, in an action for libel, where (the writing being lost) parol evidence was given of its contents, there being a variance between that evidence and the libel set forth, it was held that the judge had no power to amend. *Brooks v. Blanshard*, 1 *Crom. and M.* 779.

The amendment of variances is further facilitated by the 3 and 4 W. 4, c. 42, s. 23, which reciting that great expense is often incurred, and delay or failure of justice takes place, at trials, by reason of variances as to some particular or particulars between the proof and the record or setting forth, on the record or document on which the trial is had, of contracts, customs, prescriptions, names, and other matters or circumstances not material to the merits of the case, and by the mis-statement of which the opposite party cannot have been prejudiced, and the same cannot in any case be amended at the trial, except where the variance is between any matter in writing or in print produced in evidence and the record: It is enacted, that it shall be lawful for any court of record, holding plea in civil actions,

and any judge sitting at Nisi Prius, if such court or judge shall see fit so to do, to *cause the record, writ, or document* on which any trial may be pending before any such court or judge, in any civil action, or in *any information in the nature of a quo warranto,* or proceedings on a mandamus, when any variance shall appear between the proof and the recital or setting forth, on the record, writ, or document on which the trial is proceeding, of any *contract, custom, prescription, name, or other matter,* in *any particular or particulars in the judgment of such court or judge* not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence, to be forthwith amended by some officer of the court or otherwise, both in the part of the pleadings where such variance occurs, and in every other part of the pleadings which it may become necessary to amend, on such terms as to payment of costs to the other party, or postponing the trial to be had before the same or another jury, or both payment of costs and postponement, as such court or judge shall think reasonable; and in case such variance shall be in some particular or particulars in the judgment of such court or judge not material to the merits of the case, but such as that the opposite party may have been prejudiced thereby in the conduct of his action, prosecution, or defence, then such court or judge shall have power to cause the same to be amended upon payment of costs to the other party, and withdrawing the record or postponing the trial as aforesaid, as such court or judge shall think reasonable; and after any such amendment the trial shall proceed, in case the same shall be proceeded with, in the same manner in all respects, both with respect to the liability of witnesses to be indicted for perjury, and otherwise, as if no such variance had appeared; and in case such trial shall be had at Nisi Prius or by virtue of such writ as aforesaid, the order for the amendment shall be indorsed on the postea or the writ, as the case may be, and returned together with the record or writ, and thereupon such papers, rolls, and other records of the court from which such record or writ issued, as it may be necessary to amend, shall be amended accordingly; and in case the trial shall be had in any court of record, then the order for amendment shall be entered on the roll or other document upon which the trial shall be had; provided that it shall be lawful for any party who is dissatisfied with the decision of such judge at Nisi Prius, sheriff, or other officer, respecting his allowance of any such amendment, to apply to the court from which such record or writ issued for a new trial upon that ground, and in case any such court shall think such amendment improper, a new trial shall be granted accordingly, on such terms as the court shall think fit, or the court shall make such other order as to them shall seem meet.

And by section 24 it is enacted, that the said court or judge shall and may, if they or he think fit, in all such cases of variance, instead of causing the record or document to be amended as aforesaid, direct the jury to find the fact or facts according to the evidence, and thereupon such finding shall be stated on such record or document, and, notwithstanding the finding on the issue joined, the said court or the court from which the record has issued shall, if they shall think the said variance immaterial to the merits of the case, and the mis-statement such as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the very right and justice of the case.

Variance in contract—in the parties.] It is a fatal variance, if it appear that a party who ought to be joined as plaintiff has been omitted; *Graham v. Robertson*, 2 *T. R.* 282; 1 *Saund.* 291, *h* (*n*); but it is no variance to omit a person who might have been joined as defendant; the non-joinder must be pleaded in abatement. *Evans v. Lewis*, 1 *Saund.* 291, *d* (*n*). *Vide post*, "*Assumpsit, Defence, Pleas in Abatement.*" Thus, where the declaration stated a bill of exchange to have been drawn upon, and accepted by the three defendants, and it was proved to have been drawn upon and accepted by them jointly, with a fourth, it was held no variance. *Mountstephen v. Brooke*, 1 *B. and A.* 224. Where a contract has been made with two persons, one of whom has since died, and the action is brought upon such contract by the survivor, without stating the fact of his being survivor, it is a fatal variance; *Jell v. Douglas*, 4 *B. and A.* 374; but it is otherwise with regard to the party *against* whom an action is brought, who need not be stated to be survivor, for the joint debt may, by reason of the death of the party, be treated as if it had been originally a separate debt. *Richards v. Heather*, 1 *B. and A.* 29. Where a contract is made by one of several partners (the partnership being really interested) it is no variance, that the action is brought in the names of all the partners. *Garrett v. Handley*, 4 *B. and C.* 664. Thus, where an application is made to a banker, a member of a firm, for a loan, and the advance is made out of the money of the firm in which the partners are jointly interested, the action may be brought by all the members of the firm. *Alexander v. Barker*, 2 *C. and J.* 133. But it is otherwise where *the customer* sues. Thus, where the joint owners of a vessel permitted one of their body to keep a separate account in his own name with the defendants (bankers), who received money on behalf of the vessel, and carried it to his account, it was held that the other joint owners could not sue for money had and received, on the ground of want of privity; *Sims v. Brittain*, 4 *B. and Ad.* 375; and *per Parke, J.*, the case is the same as

if the defendants had been the bankers of the single owner. *Id. p.* 377. And so where the joint owner kept only a separate account with the banker, to the credit of which he paid in money belonging to the other joint owners. *Sims v. Bond*, 2 *Nev. and Man.* 608. Where three persons agreed to be jointly interested in certain goods, but that they should be bought by one of them in his own name only, and he made the contract accordingly, it was held that all the three might sue for a breach of that contract; *Cothay v. Fennell*, 10 *B. and C.* 671; for the action may be maintained either in the name of the person with whom the contract was actually made, or in the name of the parties really interested. *Skinner v. Stocks*, 4 *B. and A.* 437 Thus the joint owners of a vessel engaged in the whale fishery may sue a purchaser for the price of whale oil, though the contract of sale was made by one of the part owners, and the purchaser did not know that other persons had any interest in the transaction. *Ibid.* And, where an attorney carried on business under the firm of "A. and Son," the son not being in fact a partner, but acting as a clerk to his father, and receiving a salary, it was held that A. might maintain an action in his own name, to recover from a client the amount of a bill for business done. *Kell v. Nainby*, 10 *B. and C.* 20. An agent who purchases for an unnamed principal (the bought and sold notes being made out in the agent's name) may, on the renunciation of the contract by his principal, sue for the non-delivery of the goods in his own name. *Short v. Spackman*, 2 *B. and Ad.* 962. It is a fatal variance to describe a bond conditioned for payment by A., B., and C., as a bond for payment by A., B., and D., though the bond be several as well as joint, and the action be against A. severally. *Adams v. Bateson*, 6 *Bingh.* 110. The non-joinder of a secret partner cannot be pleaded in abatement; *Mullett v. Hook, M. and M.* 88, *see post, "Assumpsit, Defence, Pleas in Abatement;"* the rule being that where there is a dormant partner, an action may be maintained either against the others alone, or against them and the dormant partner jointly. *Ex parte Chuck*, 8 *Bingh.* 471. *De Mautort v. Saunders*, 1 *Barn. and Adol.* 398.

Variance in contract—in consideration.] It is not necessary for the plaintiff to set out all the several parts of a contract consisting of distinct and collateral provisions, it is sufficient to state so much of the contract as contains the entire consideration for the act, and the entire act to be done in virtue of such consideration, including the time, manner, and other circumstances of its performance. *Clarke v. Gray*, 6 *East*, 568. *Parker v. Palmer*, 4 *B. and A.* 387. Thus, where the plaintiff declared that in consideration of his re-delivery to the defendant of an unsound horse, the defendant promised to deliver to him another horse, which should be worth 80*l.*, and be a young

horse, and a breach was assigned in both those respects, it was held no variance, though it was proved that the defendant also promised that the horse was *sound*, and had never been in harness. *Miles v. Sheward*, 8 *East*, 7. The omission of any part of the consideration is a fatal variance. Thus, in assumpsit by landlord against the assignees of a bankrupt, on an agreement to pay ten shillings in the pound for rent due from the bankrupt and themselves, it appeared that part of the consideration was, that the plaintiff should accept a surrender, which consideration being omitted, the plaintiff was nonsuited. *Dashwood v. Peart, Manning's Index*, 308. So where the contract declared on was, that the defendant should deliver to the plaintiff all his tallow at 4s. per stone, and the contract proved was, that the defendant should deliver it at 4s. per stone, and so much more as the plaintiff paid to any other person, the variance was held fatal. *Churchill v. Wilkins*, 1 *T. R.* 447. It seems, that if the declaration state the consideration to be certain reasonable reward, evidence that a specific sum was agreed on will not be a material variance. *Semb. per Chambre, J., Bayley v. Tucker*, 2 *Bos. and Pul. N. R.* 458.

Variance in contract—in the promise.] It is only necessary to state so much of the promise, for the breach of which the plaintiff proceeds, *supra*. But the omission of a qualification in the promise will be fatal. Thus the statement of a general warranty of a horse is not supported by proof of a warranty of soundness, *excepting a kick* on the leg. *Jones v. Cowley*, 4 *B. and C.* 445. So when the plaintiffs declared, that for certain hire and reward the defendants undertook to carry goods from London, and deliver them safely at Dover, and the contract proved was to carry and deliver safely, (fire and robbery excepted,) the variance was held fatal. *Latham v. Rutley*, 2 *B. and C.* 20. So a promise in the alternative cannot be stated as an absolute promise. *Penny v. Porter*, 2 *East*, 2. So any addition to the promise will be a fatal variance. Thus, a contract to deliver soil cannot be declared upon as a contract to deliver soil, *or breeze*, if it appear that soil and breeze are different articles. *Clark v. Manstone*, 5 *Esp.* 239. So the omission of any part of the entire promise, for the breach of which the plaintiff proceeds, will be fatal. Thus, where land was alleged to have been demised at a rent of 15*l.*, and in evidence the rent appeared to be 15*l.* and three fowls, the variance was held fatal. *Sands v. Ledger*, 2 *Ld. Raym.* 792. So where the allegation was, that the defendant promised to farm certain land in a husbandlike manner, and the proof was that he promised to farm the land in a husbandlike manner, to be kept constantly in grass, the variance was held fatal. *Saunderson v. Griffiths*, 5 *B. and C.* 909. But, if the omission does not alter the legal effect of the promise, the variance is

immaterial. Thus, where the promise was stated to be to deliver a quantity of gum Senegal, but the contract appeared by the evidence to be for the delivery of *rough* gum Senegal, the variance was held immaterial, it appearing that all gum Senegal on its arrival in this country is called rough. *Silver v. Heseltine*, 1 *Chitty*, 39. So where the declaration stated that the defendant had agreed to buy a large quantity of head matter and sperm oil, in the possession of the plaintiff, which was afterwards ascertained to be a given quantity, and the contract proved was for the purchase of "all the head matter and sperm oil, *per the Wildman*," it was held no variance. *Wildman v. Glossop*, 1 *B. and A*. 9.

Variance in contract—in legal effect.] It is in general sufficient to describe a contract according to its legal effect. *See Thornton v. Jones*, 2 *Marsh*. 287. An agreement to sell oats at so much per bushel must be taken to mean the legal bushel, and will not be supported by evidence to sell by some other bushel. *Hockin v. Cooke*, 4 *T. R*. 314. So if a bill of exchange is stated to have been drawn for a certain sum of money, it will be intended to be English money. *Kearney v. King*, 2 *B. and A*. 301. *Sprowle v. Legge*, 1 *B. and C*. 16. But, upon a common count for money lent, it is no variance if the loan is proved to have been of foreign coin, as pagodas. *Harington v. Macmorris*, 5 *Taunt*. 228. It has been held, that a statement of a contract to deliver saddles to the plaintiff at a reasonable price, is supported by proof of an agreement to deliver saddles "at 24*s*. *a* 26*s*." *Laing v. Fidgeon*, 6 *Taunt*. 108, *and see Bayley v. Tucker*, 2 *N. R*. 458, *ante*, p. 60. But where the declaration was for not removing goods in a reasonable time, and the contract proved was to remove in a month, it was ruled by Lord Kenyon to be a fatal variance. *Hore v. Milner*, *Peake*, 42, *a*. So an averment of a contract to do an act on request, is not proved by a contract to do it on a certain day. *Bordenave v. Bartlett*, 5 *East*, 111. So the allegation of an agreement to take a full cargo of wheat is not supported by evidence of an agreement to take on board 500 quarters of wheat, though that quantity in fact amounts to a full cargo. *Harrison v. Wilson*, 2 *Esp*. 708. *But see Wickes v. Gordon*, *post* 62. An allegation of a retainer "at a certain salary, to wit, 250*l*. per annum," can be supported only by proof of a contract for a specific annual salary. *Preston v. Butcher*, 1 *Stark*. 3. The statement of a contract for the purchase of a certain quantity, to wit, eight tons of goods, is supported by proof of a contract for the purchase of *about* eight tons, the precise quantity having been ascertained to be eight tons. *Gladstone v. Neale*, 13 *East*, 410. The statement of a contract to deliver stock on the 27th of February, is proved by evidence of a contract to deliver on the settling day,

coupled with proof that the settling day was fixed for, and understood by the parties to mean the 27th of February. *Wickes v. Gordon,* 2 *B. and A.* 335. An averment, that a bill was drawn by certain persons using the style of "Ellis, Needham, and Co." is supported by proof, that the bill was drawn by A. only, under the firm of Ellis, Needham, and Co. *Bass v. Clive,* 4 *Mau. and S.* 13. So a general averment, that a bill was accepted by the defendants, is proved by evidence, that it was accepted by their authorised agent, for them. *Heys v. Heseltine,* 2 *Campb.* 604. And a conveyance, to the defendant's nominee, supports an averment that the defendant became the purchaser. *Seamen v. Price, R. and M.* 195. A declaration on a joint bond is supported by proof of a joint *and several* bond. *Middleton v. Sandford,* 4 *Campb.* 34. In an action on a promissory note by A. B., if the plaintiff allege that the note was made payable to him by the name of A. C., and the note appears to have been made payable to A. C., the plaintiff is entitled to recover, if it be shown that he was the person really meant, for that is the legal effect. *Willis v. Barrett,* 2 *Stark.* 29. Where two lots are sold under an inclosure act, a declaration upon a sale of "divers, to wit, two lots, &c." is bad, the agreements being separate both in law and fact, and not forming one contract. *James v. Shore,* 1 *Stark.* 428, *and see Emmerson v. Heelis,* 2 *Taunt.* 47.

Variance in prescription.] Where a prescription is alleged in bar, it is an entire thing, and must be proved as laid. *Per Holroyd, J., Ricketts v. Salwey,* 2 *B. and A.* 366. The proof must be of a prescription as ample as that alleged, and therefore, on a prescription for all commonable cattle, evidence of common for sheep and horses only, will not maintain the issue. *Pring v. Henley, B. N. P.* 59. So where the defendant prescribed for all cattle, &c., at all times of the year, and it appeared in evidence that sheep were excepted for a certain time in the year, the court held the prescription not to be proved. *R. v. Hermitage, Carth.* 241. But the proof of a larger prescription than that alleged will not be a variance. Thus, where the defendant prescribed for a right of common for 100 sheep, and the jury found a right for 100 sheep and *six cows,* the prescription was held to be proved. *Bushwood v. Pond, Cro. Eliz.* 722, *and see Bruges v. Searle, Carth.* 219, *Bailiffs of Tewkesbury v. Bricknell,* 1 *Taunt.* 142, 1 *Campb.* 315 (*n.*) In an action on the case for the disturbance of a prescriptive right of common, the plaintiff need not prove a right co-extensive with that stated in his declaration. *B. N. P.* 75. *Vide post.* Thus, if the right be claimed in respect of a messuage and so many acres of land, proof that the common is in respect of the land only, will be sufficient to support the declaration. *Ricketts v. Salwey,* 2 *B. and A.* 360.

Variance in custom.] On a justification by the lord of a manor, that the lord should have the best beast on the tenant's death, the custom proved was, that the lord should have the best beast, *or good*, and the variance was held fatal. *Adderley v. Hart*, 1 *B. and P.* 394 (*n*). Where a plea of justification, for taking two horses as heriots, stated a custom in the manor, that the lord, from time immemorial, until the division of a certain tenement into moieties, had taken, and been accustomed to take a heriot, upon the death of every tenant dying seised, and since the division the lord had taken, and been accustomed to take, on the death of every tenant dying seised of either of the moieties, a heriot for each moiety, it was held that this must be taken to be one entire custom, and not two distinct customs, the one applicable to the tenement before, and the other after the division of it, and that being alleged to be an immemorial custom, it was disproved by evidence that the division was made within memory. *Kingsmill v. Bull*, 9 *East*, 185.

Variance in torts.] The omission of a person who ought to be joined as plaintiff in an action *ex delicto*, is only ground of plea in abatement, and is no variance. *Dockwray v. Dickinson*, *Skin.* 640. *Bloxam v. Hubbard*, 5 *East*, 420. And the omission of a person who might have been joined as defendant cannot in any manner be taken advantage of; 1 *Saund.* 291, *e* (*n*); unless in case of one tenant in common of land, sued in respect of the land, in which case he may plead the non-joinder of his co-tenant in abatement. 1 *Saund.* 291, *f* (*n*). In actions of tort, it is no variance to prove a part only of the cause of action stated. Thus, in a count for slander, where the obnoxious words contain distinct charges, it is sufficient to prove the words conveying any one of those charges, provided the other words do not affect, or modify, those which are proved. *Flower v. Pedley*, 2 *Esp.* 491. So where the plaintiff declares for the disturbance of a right of common, which he has in respect of a messuage and land, he may prove a right of common in respect of the land only. *Ricketts v. Salwey*, 2 *B. and A.* 360, *supra*. But where in an action of tort, matter of contract is alleged, it must be proved as laid. *Bristow v. Wright*, *Dougl.* 664. So matter of description must be proved as alleged; thus, in a declaration for assaulting a constable in the execution of his office, it was alleged that he was constable of a particular parish, but it appeared in evidence that he was sworn in for a liberty, of which the parish was part, and the variance was held fatal. *Goodes v. Wheatly*, 1 *Campb.* 231. The facts averred, or a part of them, sufficient to constitute a cause of action, must be proved as laid. Therefore, evidence that the defendant made a statement of facts amounting to a *tortious conversion*, will not support a count for

imputing the crime of felony. *Tempest v. Chambers*, 1 *Stark.* 67. So evidence of the improper stowing of the defendant's anchor, whereby it broke into another vessel and damaged the plaintiff's goods, will not support a count stating the injury to have been caused by the unskilful steering of the defendant's ship. *Hullman v. Bennett*, 5 *Esp.* 226. So where the declaration stated, that the defendant wrongfully placed and continued a heap of earth, whereby the refuse water was prevented from flowing away from his house down a ditch, at the back thereof, and it appeared in evidence, that the heap was not originally placed so as to obstruct the water, but that, in process of time, earth from the heap was trodden down, and fell into the ditch and obstructed it, the variance was held fatal, for the injury was not the immediate act of the defendant's, but consequential. *Fitzsimons v. Inglis*, 5 *Taunt.* 534.

In actions of tort, as in other cases, it is sufficient to state matters according to their legal effect. Thus, in an action by the consignor of goods against the carrier, on a promise to carry them for a certain sum and reward to be paid by the plaintiff, proof of an agreement between the consignor and consignee, that the latter shall pay the carriage, is no variance, the consignor being in law liable to the defendant. *Moore v. Wilson*, 1 *T. R.* 659. So in an action on the case for damages, occasioned by the defendant's negligence in driving his carriage, it is sufficient to show that the damage was occasioned by the negligence of his servant. *Brucker v. Fromont*, 6 *T. R.* 659.

Variance in records, writs, &c.] Where a record is stated by way of inducement, and is not the gist of the action, it is not necessary to describe it with a *prout patet*, &c., and it is sufficient to prove it substantially. Thus, in an action for a false return to a *fi. fa.*, where the declaration stated that the plaintiff in Trinity Term, 2 Geo. 4, recovered, &c., *prout patet per recordum*, and a judgment of Easter Term, 3 Geo. 4, was given in evidence, it was held no variance. *Stoddart v. Palmer*, 3 *B. and C.* 2. *Phillips v. Shaw*, 4 *B. and A.* 435. *Bennett v. Isaac*, 10 *Price*, 154. *R. v. Coppard*, *M. and M.* 118. But where the judgment is the gist of the action it is otherwise. Thus in an action of debt on a judgment, if the declaration state the judgment to have been recovered in such a Term, *prout patet*, &c., and it appears in evidence to have been recovered in another Term, the variance is fatal. *Rastall v. Straton*, 1 *H. Bl.* 49. In an action for a malicious prosecution, it was averred, that the defendant prosecuted an indictment against the plaintiff, until afterwards, to wit, on a certain day, the plaintiff was in due manner acquitted; the record of acquittal was on another day, but the court held that the variance was immaterial, and that the averment was sub-

stantially proved. *Purcell v. Macnamara*, 9 *East*, 157. In an action for maliciously arresting and holding the plaintiff to bail, the declaration, in setting out the judgment by default, in the former action, stated, "that it was thereupon considered that the plaintiffs should take nothing by their said writ, but that they *and their pledges to prosecute should be in mercy, &c.*;" it was held to be no material variance that the record produced had not the words, "and their pledges to prosecute," but only an *&c.*, for that those words might be rejected as surplusage, the substance of the allegation being the discontinuance of the former suit. *Judge v. Morgan*, 13 *East*, 547. An averment in an action for an escape, that bail above was put in before a judge at chambers, "as appears by the record of the recognizance," is not supported by evidence of an examined copy of the entry of the recognizance of bail, stating the recognizance to have been taken *before the court at Westminster*. *Bevan v. Jones*, 4 *B. and C.* 403. In an action against the sheriff, on the stat. 8 Anne, c. 14, an averment that the *fi. fa.* issued out of the King's Bench is not proved by a *fi. fa.* issuing out of the Common Pleas. *Sheldon v. Whittaker*, 4 *B. and C.* 657. Where in a declaration for an escape it was stated that a judgment was recovered in Easter Term, 5 Geo. 4, and that in Trinity Term in the same year there was *an award of execution* by the court, and thereupon a commitment of the defendant to the custody of the marshal, it was held not to be necessary to prove the *sci. fa.*, it being immaterial. *Bromfield v. Jones*, 4 *B. and C.* 380. *See also Edwards v. Lucas*, 5 *B. and C.* 339. *R. v. Coppard*, *M. and M.* 118.

The description of an act of parliament as "an act passed in the second and third years of the reign, &c." is bad. It should be "in *the session* of the second and third," &c. *R. v. Biers*, 1 *Ad. and Ell.* 327, 3 *Nev. and M.* 475, *S. C.*

Variance in deeds.] When a deed is stated in pleading, it must be proved as stated. Therefore, where a covenant is set out absolutely, without the qualifying context which belongs to it, this being an untrue statement of the deed, in point of substance and effect, the variance will be fatal. *Howel v. Richards*, 11 *East*, 641. Thus, where the declaration stated a covenant to repair generally, and on *non est factum* pleaded, it appeared that the covenant contained an exception of "fire and all other casualties," Lord Ellenborough held the variance fatal. *Tempany v. Burnand*, 4 *Campb.* 20; *and see Swallow v. Beaumont*, 2 *B. and A.* 765. But when it is stated that by a certain deed, "it is witnessed," &c., there can be no variance, if the very words of the deed are set out. *Per Holroyd, J.*, *Ross v. Parker*, 1 *B. and C.* 362. And where a deed contains a proviso, in defeasance of a covenant, but not incorporated therewith, it is no variance to omit such proviso; *Gordon v.*

Gordon, 1 *Stark.* 294; unless the proviso be referred to in the covenant, in which case, it will be taken to form part of it. *Vavasour v. Ormrod*, 6 *B. and C.* 430. A deed may be stated according to its legal effect. Thus, where a lease was stated in a declaration to be made by the plaintiff of the one part, and T. R. of the other part, but appeared in evidence to have been actually made by the plaintiff *and his wife* of the one part, and T. R. of the other part, it was held to be no variance. *Arnold v. Revoult*, 1 *B. and B.* 443. If a plaintiff states the legal effect of a deed, the defendant has a right to see it on oyer, and if the meaning varies from that attributed to it in the declaration, in order to take advantage of that variance, he should plead *non est factum*, without setting out the deed; if it does not support the breach he should set it out and demur; if, however, he sets out the deed on oyer, and pleads *non est factum*, the only question at the trial of that issue is, whether the deed, whereof the tenor is set out, was executed by the defendant or not. *Snell v. Snell*, 4 *B. and C.* 741. Where a deed granted liberty to make levels, pits, and *soughs*, and the declaration stated it as a liberty to make levels, pits, and *sloughs*, it was held, that under the rule *noscitur à sociis*, the court could discover this to be the word soughs mis-spelt, and that the variance was not fatal. *Morgan v. Edwards*, 6 *Taunt.* 394. So where the plaintiff declared that by indenture he demised to the defendants "certain lands and premises," and the demise appeared to be of "all that piece, or parcel of ground, and premises, containing by estimation one acre," the variance was held to be immaterial. *Birch v. Gibbs*, 6 *Mau. and S.* 115. But the words "*Cellar* beer field," for "*aller* beer field," were held a fatal variance in setting out a covenant, though the plaintiffs waived the damages on the breach of that covenant. *Pitt v. Green*, 9 *East*, 188. So "storehouses" for "storehouse." *Hoar v. Mill*, 4 *Mau. and S.* 470. If a man is described as *James* C. in one part of a deed, and afterwards as *George* C., and signs it *George* C., he is properly declared against as George C. *Mayelstone v. Ld. Palmerston*, *M. and M.* 6.

Variance in time.] Where the time is material, or where it is alleged by way of description, it must be proved as laid. Thus, in debt to recover penalties for usury, the day on which the money was lent is material, though laid under a *videlicet*, and a variance from that day is fatal. *Partridge v. Coates*, *R. and M.* 153. *Fox v. Keeling*, 4 *Nev. and M.* 527. So where a writ was described in terms, and on the production of the writ it appeared to be returnable on a different day from that stated, the variance was held to be fatal, though the day was laid under a *videlicet*. *Green v. Rennet*, 1 *T. R.* 656; *see also Rastall v. Straton*, 1 *H. Bl.* 49, *ante*, p. 64. So where the declaration alleged that the defendant, on such a day, made his

certain bill of exchange, "bearing date the day and year aforesaid," and the real date of the bill was different, this being a variance in matter of description was held fatal. *Anon.* 2 *Campb.* 308 (*n*).

But where the time is neither material nor matter of description, a variance from it will not be fatal. Thus, where the declaration stated, that the defendant made his certain bill of exchange on such a day, but not that it *bore date* on that day, a variance from that day was held to be immaterial. *Coxon v. Lyon*, 2 *Campb.* 307 (*n*). So where the declaration alleged that a bill, drawn on the 18th August, and payable 60 days after sight, was "afterwards, to wit, on the day and year aforesaid," accepted by the defendant, and the bill appeared to be accepted on the 19th September, Lord Ellenborough held the variance immaterial. *Freeman v. Jacob*, 4 *Campb.* 209. So where a bill was stated in the declaration to have been indorsed *before* it became due, and appeared in evidence to have been indorsed *after* it became due, the variance was held immaterial. *Young v. Wright*, 1 *Campb.* 139; *see also Purcell v. Macnamara*, 9 *East*, 157, *ante*, *p*. 65. So in trespass the day is immaterial; but in trespass with a *continuando*, or with a "divers days and times," though the plaintiff may prove any number of trespasses within the time laid, yet he can only prove a single act of trespass before the first day. *B. N. P.* 86. 1 *Saund.* 24 (*n*).

Variance in place.] Whenever a place is mentioned by way of description, and not merely as venue, a variance will be fatal, even though the local situation need not have been mentioned. *Guest v. Caumont*, 3 *Campb.* 235. Where the action is not local, the description of the place may be referred to venue, and a variance will not be material. Thus in an action for negligence, an allegation that the plaintiff's boat was run down in the Thames *near* the Half-way-reach, is supported by proof that the boat was run down *in* the Half-way-reach. *Drewry v. Twiss*, 4 *T. R.* 558. So in an action on the case, for setting up a certain mark in front of the plaintiff's dwelling-house, in order to defame him as the keeper of a bawdy-house, if the declaration, after describing the house as situate in a certain street called A. street, in the parish of O. A. (there being no such parish), afterwards state the nuisance to be erected and placed *in the parish aforesaid*, it will be ascribed to venue, and need not be proved as laid. *Jefferies v. Duncombe*, 11 *East*, 226: *and see Mersey Navigation v. Douglas*, 2 *East*, 497, *Hamer v. Raymond*, 1 *Marsh.* 363. But in an action on the case for a nuisance in erecting a weir, if it be described in the declaration to be at H., and be proved to be at a lower part of the same water called T., the variance is fatal. *Shaw v. Wrigley*, *cited* 2 *East*, 500. Where the allegation of

place is descriptive of a contract, it must be proved as laid. Thus, in an action against a carrier a misdescription of the *termini* in the contract of carriage is fatal. *Tucker v. Cracklin*, 2 *Stark*. 385. *See Woodward v. Booth*, 7 *B. and C.* 301; *and further as to the proof of local descriptions, post, in "Assumpsit for use and occupation," "Case against Carriers," "Ejectment." and "Trespass quare clausum fregit."*

AFFIRMATIVE OF THE ISSUE TO BE PROVED.

The general rule with regard to the *onus* of proving the issue is, that the party who asserts the affirmative is bound to prove the issue. Thus in an action for a loss occasioned by the barratry of the master of a vessel, it is not incumbent on the plaintiff, after proving the barratrous act, to prove also that the master was *not* the owner, or freighter, for that would be calling on him to prove a negative; the proof of that fact, which operates in discharge of the other party, lies upon him. *Ross v. Hunter*, 4 *T. R.* 33. So where in an action on an agreement to pay 100*l.* if the plaintiff would not send herrings to the London market, and particularly to the house of J. S., the plaintiff proved that he had sent no herrings during the twelvemonth to that house, it was held sufficient to entitle him to recover, no proof being given by the defendant that the plaintiff had sent herrings within the year to the London market. *Calder v. Rutherford*, 3 *B. and B.* 302, 7 *B. Moore*, 158, *S. C.* There are, however, some exceptions to this rule.

Where the presumption of law is in favour of the affirmative.] Where the presumption of law is in favour of the affirmative, as where the issue involves a charge of a culpable omission, it is incumbent on the party making the charge to prove it, although he must prove a negative, for the other party shall be presumed innocent until proved to be guilty. *As to the presumption of innocence see Rosc. Dig. Crim. Ev.* 14. Thus, where in a suit for tithes in the spiritual court, the defendant pleaded that the plaintiff had not read the Thirty-nine Articles, it was held that the proof of the issue lay on the defendant. *Monke v. Butler*, 1 *Roll. Rep.* 83. 3 *East*, 199. *R. v. Hawkins*, 10 *East*, 216. So in an action by the owner of a ship for putting combustibles on board, "without giving due notice thereof," it was held that the plaintiff was bound to prove the want of notice. *Williams v. E. I. Comp.* 3 *East*, 193; *and see Marsh v. Horne*, 5 *B. and C.* 327, *post.* So where, on a conviction for selling ale without a licence, the only evidence given was, that the party sold ale, and no proof was offered of his selling it without a licence; the party being convicted, it was held that the conviction was right, for that the informer was not bound to sustain in evidence the negative averment.

It was said by Abbott, C. J., that the party thus called on to answer for an offence against the excise laws, sustains not the slightest inconvenience from the general rule, for he can immediately produce his licence; whereas if the case is taken the other way, the informer is put to considerable inconvenience. *R. v. Harrison, Paley on Convictions*, 45, (*n*), 2*d ed.* So again, where the issue is as to the legitimacy of a child born in lawful wedlock, *Banbury Peerage case*, 2 *Selw. N. P.* 709, it is incumbent on the party asserting the illegitimacy to prove it; and where the issue is on the life of a person who is proved to have been alive within seven years; *ante, p.* 22; the party asserting his death must prove it.

Where the fact is peculiarly within the knowledge of a party.] But where the affirmative is peculiarly within the knowledge of the party charged, the presumption of law in favour of innocence is not allowed to operate in the manner just mentioned, but the general rule as above stated applies, *viz.* that he who asserts the affirmative is to prove it, and not he who avers the negative. 2 *Russell on Crimes*, 692, 2*d. ed.* Thus in an action on the game laws, though the plaintiff must aver that the defendant was not duly qualified, yet he cannot be called upon to prove the want of qualification. *Spieres v. Parker*, 1 *T. R.* 144, *Adm. R. v. Stone*, 1 *East*, 650. So in an action against a person for practising as an apothecary, without having obtained a certificate according to 55 Geo. 3, c. 194, the proof of the certificate lies upon the defendant, and the plaintiff need offer no evidence of his practising without it. *Apoth. Comp. v. Bentley, R. and M.* 159.

INSTRUMENTS OF EVIDENCE.

Under the present head will be considered the mode in which the various kinds of documentary evidence must be proved, and also the rules with regard to the competency of witnesses, and their examination.

Proof of Acts of Parliament and Journals.

Acts of parliament are either public or private. The printed statute-book is evidence of a public statute, not as an authentic copy of the record itself, but as hints of that which is supposed to be lodged in every man's mind already. *Gilb. Ev.* 10. A private act of parliament is usually proved by a copy examined with the parliament roll, *B. N. P.* 225, unless it contain a clause "that it shall be deemed and taken to be a public act, and shall be judicially taken notice of without being specially pleaded," in which case it is proved in the same manner as public acts, though it may not have the *effect* of a public act. *Beaumont v. Mountain*, 10 *Bingh.* 404. *Woodward v. Cotton*,

1 *Crom. M. and R.* 44, 4 *Tyr.* 689, *S. C.* *Brett v. Beales, M. and M.* 421. By stat. 41 Geo. 3, c. 90. s. 9, the copy of the statutes of England, and of Great Britain since the union with Scotland, printed by the King's printer, shall be received as conclusive evidence of the statutes enacted prior to the union of Great Britain and Ireland, in any court of civil or criminal jurisdiction in Ireland; and in like manner the copy of the statutes of the kingdom of Ireland, made by the parliament of the same, printed by the King's printer, shall be received as conclusive evidence of the statutes enacted by the parliament of Ireland prior to the union of Great Britain and Ireland, in any court of civil or criminal jurisdiction in Great Britain.

The journals of the House of Lords, and of the House of Commons, may be proved by examined copies, but the printed journals are not evidence. *Lord Melville's case*, 24 *How. St. Tr.* 683. *R. v. Lord G. Gordon*, 2 *Dougl.* 593. An unstamped copy of the minutes of the reversal of a judgment in the House of Lords, without more of the proceedings, is evidence of the reversal. *Jones v. Randall, Cowp.* 17.

Proof of Records.

Upon an issue of nul tiel, &c.] Upon an issue of *nul tiel record*, the record, if a record of the same court, is produced, and inspected by the court; *Tidd*, 801; if a record of an inferior court, it is proved by the tenor of the record, certified under a writ of *certiorari*, issued by the superior court, *id.* 804; if a record of a concurrent superior court, it is proved by the tenor certified under a writ of *certiorari*, issued out of Chancery, and transmitted thence by writ of *mittimus*. *Ibid.*

Where *nul tiel record* is not pleaded, but it is necessary to prove a record in support of some allegation in the pleadings, the record may be proved either by an exemplification or a copy. Exemplifications are of two kinds, either under the great seal, or under the seal of the court in which the record is preserved. An exemplification under the great seal may be obtained of any record of the Court of Chancery, or of any record which has been removed thither by *certiorari*, but private deeds, exemplified under the broad seal, will not be admitted in evidence. *B. N. P.* 227. Exemplifications of the records of a public court, under its own seal, are admissible without proof of the genuineness of the seal. *Tooker v. Duke of Beaufort, Sayer*, 297. But the genuineness of the seal of a foreign court must be proved; *Henry v. Adey*, 3 *East*, 221; and, if a foreign court has an official seal, it must be used for the purpose of authenticating its judgments, and a copy by an officer of the court is not sufficient. *Black v. Lord Braybrook*, 2 *Stark.* 7; *and see Appleton v. Lord Braybrook*, 6 *Mau. and Sel.* 34. If a colonial court possess a seal, it should be used to

authenticate its judgments, though so much worn as no longer to make any impression. *Cavan v. Stewart*, 1 *Stark.* 525. If there be no seal of the court or island, an examined copy must be obtained; *per Lord Ellenborough, Appleton v. Lord Braybrooke*, 6 *Mau. and S.* 36; or distinct evidence should be given that the court has no seal, and verifies its judgments by the signature of the judge. *Alves v. Bunbury*, 4 *Campb.* 28. The seal of a corporation must be proved to be genuine by a witness acquainted with it; *Moises v. Thornton*, 8 *T. R.* 307; but it is not necessary to call a witness who saw the seal affixed. *Ibid.* The seal of the corporation of London has been held to prove itself. *Doe v. Mason*, 1 *Esp.* 53. If it appear that the seal of the corporation was affixed, not by the authority of the body corporate, but by a stranger, the instrument is invalid. *Anon.* 12 *Mod.* 423. *See also R. v. Inhab. of Haughley*, 4 *B. and Ad.* 650. *Clarke v. Imperial Gas Light Comp. Id.* 319.

Examined copy of a record.] When the record is complete, an examined copy will be evidence, unless upon the issue of *nul tiel record*. Records are not complete until delivered into court in parchment, therefore a minute-book, from which an entry of the proceedings at sessions is made, and from which book the roll containing the record of such proceedings is subsequently made up, is not a record. *R. v. Bellamy, R. and M.* 171. So the judgment in paper, signed by the Master, is not evidence, for it is not yet become permanent; *B. N. P.* 228, 3 *C. and P.* 192, nor the minute-book of the clerk of the peace to prove that an indictment was preferred. *R. v. Smith*, 8 *B. and C.* 341. *Porter v. Cooper*, 6 *C. and P.* 354. So an allegation that an appeal came on to be heard at the sessions must be proved by the production of the record regularly made up in parchment, and not by the minute-book of the sessions. *R. v. Ward*, 6 *C. and P.* 366. The copy of a record must be proved by a witness who has examined it line for line with the original, or who has examined the copy while another person read the original. *Reid v. Margison*, 1 *Campb.* 469. And it is not necessary for the persons examining to exchange papers, and read them alternately. *Gyles v. Hill, Id.* (*n*). *Rolf v. Dart*, 2 *Taunt.* 52. *Fyson v. Kemp*, 6 *C. and P.* 72. It ought to appear that the record from which the copy was taken was seen in the hands of the proper officer, or in the proper place for the custody of such records. *Adamthwaite v. Synge*, 1 *Stark.* 183, 4 *Campb.* 372, *S. C.* Where an ancient record has been lost, an old copy has been allowed to be given in evidence, without proof of its being a true copy. *Anon.* 1 *Vent.* 257. *B. N. P.* 228.

Office copies.] An office copy in the same court, and in the same cause, is equivalent to a record; but in another court, or in another cause in the same court, the copy must be proved. *Per Lord Mansfield, Denn v. Fulford,* 2 *Burr.* 1179. But the office copy of an affidavit made in another cause in the same court has been admitted as good evidence. *Wightwick v. Banks, Forrest,* 153. An office copy of depositions in Chancery is evidence in that court, but will not be admitted in a court of common law, without examination with the roll; *B. N. P.* 229; *Burnand v. Nerot,* 1 *C. and P.* 578. *Highfield v. Peake, M. and M.* 109; unless perhaps in the case of the trial of an issue out of Chancery. *M. and M.* 109. By 7 Geo. 4, c. 57, s. 74, office copies of proceedings in the Insolvent Court are made evidence. *Vide post.*

Copies made by authorised officers.] Where a copy is made by a person trusted for that purpose, it is admissible in evidence without proof of its having been actually examined. *B. N. P.* 229. Thus, the chirograph of a fine is evidence of the fine, the chirographer being appointed to make that copy, but it is not evidence of the proclamations, for of them the chirographer is not appointed to make a copy. *Ibid. Gilb. Ev.* 23. So the indorsement by the proper officer on a deed of bargain and sale inrolled according to stat. 27 Hen. 8, c. 16, is evidence of the inrolment; *Ibid. Kinnersley v. Orpe,* 1 *Dougl.* 56; and the date of inrolment indorsed by the clerk of the inrolments is conclusive evidence of the date. *R. v. Hopper,* 3 *Price,* 495. So a copy of the depositions of a witness taken at a judge's chambers, signed by the judge, and delivered out by his clerk, is admissible, without proof of examination with the original. *Duncan v. Scott,* 1 *Campb,* 101. A copy of a judgment, purporting to have been examined by the clerk of the treasury (who is not intrusted to make copies), is not admissible without proof of its examination with the original. *B. N. P.* 229.

To prove the time of signing a judgment, the day-book kept at the judgment-office is not evidence. *Lee v. Meecock,* 5 *Esp.* 177. *Ayrey v. Davenport,* 2 *Bos. and Pul. N. R.* 474.

Proof of Verdicts.

In order to prove a verdict, when it is offered as the opinion of the jury on the issue, the *postea* alone is not sufficient, but the judgment must also be proved to show that it has not been arrested, or a new trial granted; *Pitton v. Walter,* 1 *Str.* 162; *B. N. P.* 234 unless in case of an issue out of Chancery, when no judgment is entered up. *B. N. P.* 234. So the *Nisi Prius* record, with the *postea* indorsed, or with a minute of the verdict indorsed by the officer of the court on the jury panel,

is sufficient evidence that the cause came on to be tried. *Pitton v. Walter*, 1 *Str.* 162. *R. v. Browne, M. and M.* 315. But without such minute, the *Nisi Prius* record is no evidence of the cause having come on for trial. *Per Lord Tenterden, Ibid.* In an action for a moiety of the money paid by the plaintiff under a verdict recovered by A., in a suit against the plaintiff and defendant, the *Nisi Prius* record and *postea* have been held to be evidence of the verdict and damages in the former suit, without proof of the judgment. *Foster v. Compton*, 2 *Stark.* 365. So it was held by Lord Kenyon, that the production of the *postea*, in a former cause between the same parties, would support a plea of set-off to the extent of the verdict. *Garland v. Scoones*, 2 *Esp.* 648. *But see Pitton v. Walter*, 1 *Str.* 162, *supra.*

Proof of Writ.

Where a writ is the gist of the action, it must be proved by a copy of the record after its return; but where it is only inducement to the action, it may be proved by production of the writ itself, if it has not been returned. *B. N. P.* 234. A copy of the judgment-roll, containing an award of an elegit, and the return of the inquisition, is evidence of the elegit and inquisition, in an action for use and occupation. *Ramsbottom v. Buckhurst*, 2 *Maule and S.* 565. *As to secondary evidence of a writ, see Edmonstone v. Plaisted*, 4 *Esp.* 160.

Proof of Inquisitions.

Where the return to an inquisition is given in evidence, it is in general necessary to show, that the inquiry has been made under proper authority. Thus, in the case of an inquisition *post mortem*, and such private offices, the return cannot be read without also reading the commission, unless, as it seems, the inquisition be old; *Vin. Ab. Ev.* (*A. b.* 42); but in cases of more general concern, such as the return to the commission in Henry the Eighth's time, to inquire of the value of livings, the commission is a thing of such general notoriety that it requires no proof. *B. N. P.* 223. So an ancient extent of crown lands found in the proper office, and purporting to have been taken by a steward of the king's lands, and following in its construction the direction of the statute 4 Ed. 1, will be presumed to have been taken under competent authority, though the commission cannot be found. *Rowe v. Brenton*, 8 *B. and C.* 747.

Proof of Rule of Court.

A rule of court produced under the hand of the proper officer, need not be proved to be a true copy. *Selby v. Harris*, 1 *Ld. Raym.* 745. *Duncan v. Scott*, 1 *Campb.* 102. Where a court prints and circulates copies of its rules for the guidance

of its officers, one of such copies is evidence of the rules which the officers are to act on, without showing it examined with the original. *Dance v. Robson, M. and M.* 294. A rule of court is not matter of record. *R. v. Bingham,* 3 *Y. and J.* 101.

Proof of Proceedings in Chancery.

A decree in Chancery may be proved by an exemplification, or by a sworn copy, or by a decretal order in paper, with proof of the bill and answer. *Trowel v. Castle,* 1 *Keb.* 21. *B. N. P.* 244. And it has been held, that the bill and answer need not be proved if they are recited in the decretal order. *Ibid. Com. Dig. Ev.* (*C.* 1.) The rule laid down in a book of authority is, that where a party intends to avail himself of the contents of a decree, and not merely to prove an extrinsic collateral fact, (as that a decree was made by the court,) he ought regularly to give in evidence the proceedings on which the decree is founded. 1 *Phill. Ev.* 373. *And see Peake, Ev.* 74. Still if the decree itself contains all the facts required, it seems that it would be unnecessary to produce the bill and answer, though it would be otherwise where the particular fact does not appear, as where a particular issue has been raised. *See Blower v. Hollis,* 1 *Crom. and M.* 396, 3 *Tyr.* 356. *S. C.*

An answer in Chancery is proved by the production of the bill and answer, or of examined copies of them; but on proof by the proper officer, that the bill has been searched for in the office and not found, the answer may be read without the bill. *Gilb. Ev.* 55. Some proof of the identity of the parties is requisite; it may be proved by a witness who has seen the handwriting of the defendant to the original answer, though it is not produced in court. *Dartnall v. Howard, R. and M.* 169. So if the name and description of the defendant at law agree with the name and description of the party answering in equity, it is *primâ facie* evidence of identity. *Hennel v. Lyon,* 1 *B. and A.* 182. *But see post p.* 83, 85.

An answer offered in evidence, merely as an admission of the party on oath, is sufficiently proved by an examined copy, without proof of a decree, or of the party's handwriting. *Lady Dartmouth v. Roberts,* 16 *East,* 334. So where a witness at a trial at law gave evidence at variance with what he had previously sworn in an answer in Chancery, it was held, that an examined copy of that answer was admissible to contradict him. *Ewer v. Ambrose,* 4 *B. and C.* 25. *And see Highfield v. Peake, M. and M.* 109, *infra.* A letter referred to in an answer in Chancery, deposited by consent of parties with the clerk in court, is evidence against the defendant in equity in an action at law, without reading the answer in Chancery. *Long v. Champion,* 2 *B. and Adol.* 284.

An examined copy of an affidavit filed in the court of Chan-

cery, is, as it seems, evidenee without proof of the handwriting of the party making it, provided it be shown that it has been used or acted upon by him, but in case of an indictment for perjury, the handwriting must be proved. *R. v. James,* 1 *Show.* 397. *Crook v. Dowling,* 3 *Dougl.* 75. *Casburn v. Reid,* 2 *B. Moore,* 60. *Rees v. Bowen, M'Cl. and Y.* 383. *See Rosc. Dig. Crim. Ev.* 157.

Proof of Depositions.

What a witness, since dead, has sworn on a trial between the same parties, may be given in evidence, either from the judge's notes, or from notes that have been taken by any other person who will swear to their accuracy, or it may be proved by any person who will swear from his memory to its having been given. *Per Mansfield, C. J., Mayor of Doncaster v. Day,* 3 *Taunt.* 262. *Strutt v. Bovingdon,* 5 *Esp.* 57. The witness must be prepared to prove the very words of the former witness. *Ennis v. Donisthorne,* 1 *Phill. Ev.* 219, 6*th ed.* 4 *T. R.* 209.

Depositions in a suit in Chancery are not, in general, admissible without proof of the bill and answer; *B. N. P.* 240, *Gilb. Ev.* 62; unless so ancient that no bill or answer can be found; *Gilb. Ev.* 64. *Byam v. Booth,* 2 *Price,* 234 (*n*); or unless the depositions are offered in evidence as an admission merely, or for the purpose of contradicting a witness. 1 *Phill. Ev.* 375. In general depositions before an answer put in, are not admitted to be read; *B. N. P.* 240; but if the defendant in equity is in contempt, or has neglected to take advantage of an opportunity to cross-examine, the depositions may be read on proof of the bill without the answer. *Cazenove v. Vaughan,* 1 *Maule and S.* 4.

Depositions offered in evidence, under an order of the court of Chancery, on directing a trial at law, may be read without proof of the bill and answer, it being proved, that at the time of trial the witnesses are unable to attend in person. *Palmer v. Lord Aylesbury,* 15 *Ves.* 176. And on an issue out of Chancery, an examined copy of the depositions of one of the witnesses was allowed to be read for the purpose of contradicting the evidence of the same witness on the trial of the issue. *Highfield v. Peake, M. and M.* 109.

Depositions taken on interrogatories under a commission, are not evidence without production of the commission, unless the depositions are of long standing. *Bayley v. Wylie,* 6 *Esp.* 85. *Rowe v. Brenton,* 8 *B. and C.* 765. It must also be proved, that the witness is dead, insane, or absent. *Benson v. Olive,* 2 *Str.* 920. *Falconer v. Hanson,* 1 *Campb.* 172. But where the witness had actually sailed on a voyage, the depositions were allowed to be read, though the vessel was, at the time of trial, driven back into port by contrary winds. *Fonsick v.*

Agar, 6 *Esp.* 92. But it is not sufficient that the witness is a seafaring man, and that he lately belonged to a vessel lying at a certain place, without proving that some effort has been recently made to procure his attendance. *Falconer v. Hanson*, 1 *Campb.* 172. Where depositions on interrogatories are read on the part of the plaintiff, the whole, including the answers to the cross-interrogatories, must be read as part of his case. *Temperly v. Scott*, 5 *C. and P.* 341.

As to depositions in India, see stat. 33 Geo. 3, c. 63, s. 40, 44. And with regard to the depositions of witnesses under the Interrogatory Act, 1 W. 4, c. 22, see that statute in the Appendix.

Proof of Judgment of Inferior Court.

The judgment of a county court, court baron, or other inferior jurisdiction, may be proved by production of the book containing the proceedings of the court, from the proper custody, and if not made up in form, the minutes of the proceedings will be evidence, or an examined copy of such proceedings or minutes will be sufficient. *R. v. Haines, per Holt, C. J. Comb.* 337. 12 *Vin. Ab.* (*A. b.* 26). *Hennell v. Lyon*, 1 *B. and A.* 185. Thus the minute-book of the Consistorial Court is evidence of a decree for alimony. *Houliston v. Smyth*, 2 *C. and P.* 25. But this rule does not extend to the court of quarter sessions. *R. v. Smith*, 8 *B. and C.* 341, *ante*, p. 71. It seems, that in proving the judgment of an inferior court, evidence should also be given of the proceedings previous to judgment. *Com. Dig. Ev.* (*C.* 1). *Fisher v. Lane*, 2 *W. Bl.* 836. But this will depend upon the *object* with which the proceedings are given in evidence. The book containing the original minutes will be sufficient evidence of these proceedings. *Chandler v. Roberts*, *Peake*, *Ev.* 80.

Proof of Court Rolls.

In order to prove the title of a copyholder, the court rolls may be produced; or copies of them properly stamped may be given in evidence; *Doe v. Hall*, 16 *East*, 208; the handwriting of the steward being proved; or as it seems without proof of such handwriting; *Doe v. Mee*, 4 *B. and Ad.* 617; and certainly where an admittance is more than thirty years old, proof of the signature of the steward is unnecessary. *Dean and Chapter of Ely v. Stewart*, 2 *Atk.* 45. *But see Duke of Somerset v. France*, *Fortescue*, 43. In one case, Holt, C. J. ruled, that the rough draft of the steward of the manor was good evidence. *Anon.* 1 *Ld. Raym*, 735. 6 *B. and C.* 495. And it has been held, that a surrender and presentment may be proved by a draft of an entry produced from the muniments of the manor, and the parol testimony of the foreman of the homage jury who made such

presentment. *Doe v. Calloway*, 6 *B. and C.* 484. Where a surrender was made in 1774, and there was no record of it on the Court Rolls, the books of the manor containing a record of the admission, which recited the surrender, were received as evidence of the latter. *R. v. Inhab. of Thruscross*, 1 *Ad. and Ell.* 126, 3 *Nev. and M.* 284, *S. C.*

Where a surrender of copyhold lands is made, out of court, by a deed of surrender, the copy of court roll is still evidence of the surrender, although the act of 48 Geo. 3, c. 149, requires, that in such cases, the deed of surrender or memorandum thereof shall be stamped, and not the copy of court roll as in all other cases. *Doe dem. Hawthorn v. Mee*, 1 *Nev. and M.* 424.

Proof of Probate.

Where the title to personal property, under a will, is in question, the original will cannot be read in evidence without some indorsement upon it for the purpose of authentication; but the probate must be produced *R. v. Barnes*, 1 *Stark.* 243. *Pinney v. Pinney*, 8 *B. and C.* 335. The seal of the Ecclesiastical Court on the probate proves itself. *Kempton v. Cross*, *Rep. temp. Hardw.* 108. But the probate is not the only evidence of the will being proved, for the act book of the ecclesiastical court, containing an entry of the will having been proved, and of probate granted to the executors therein named, is admissible evidence of those persons being executors, without accounting for the non-production of the probate. *Cox v. Allingham*, *Jacobs*, 514. If the probate be lost, it is not the practice of the Ecclesiastical Court to grant a second probate, but only an exemplification, which will be evidence of the proving of the will. *Shepherd v. Shorthose*, 1 *Str.* 412. To prove the probate revoked, an entry of the revocation in the book of the Prerogative Court is good evidence. *Ramsbottom's case*, 1 *Leach*, *C. C.* 30 (*n*), *3d ed.*

Proof of Letters of Administration.

Administration is proved by the production of the letters of administration, or of a certificate or exemplification thereof, granted by the Ecclesiastical Court; *Kempton v. Cross*, *Rep. temp. Hardw.* 108; *B. N. P.* 246; or, without producing the letters of administration, by the original book of acts, directing the grant of the letters; *Ibid.* *Elden v. Keddell*, 8 *East*, 187; and an examined copy of the act book, stating the grant of letters of administration to the defendant, is proof of his being administrator, without notice to produce the letters. *Davis v. Williams*, 13 *East*, 232.

Proof of Foreign Laws.

The written law of a foreign state must be proved by a copy

duly authenticated. *Clegg v. Levy*, 3 *Campb.* 166. Thus, when to prove the law of France, as to marriage, the French vice-consul produced a book, which he said contained the code of laws upon which he acted at his office; that it was printed at the office for the printing of the laws of France; and that it would have been acted upon in any of the French courts; it was ruled by Abbott, C. J., to be sufficient proof of the law. *Lacon v. Higgins*, 3 *Stark.* 178; *and see R. v. Picton*, 30 *How. St. Tr.* 514, 594. The unwritten law of a foreign state may be proved by the parol evidence of witnesses possessing professional skill. *Per Gibbs, C. J., Miller v. Heinrick*, 4 *Campb.* 155; *but see Boehtlinck v. Schneider*, 3 *Esp.* 58. A collection of treaties published by the direction of the American government, will not be sufficient to prove a treaty; a copy examined with the archives should be produced. *Richardson v. Anderson*, 1 *Campb.* 65 (*n*). An instrument purporting to be a divorce, under the seal of the synagogue at Leghorn, is not admissible without previous proof of the law of the country; *Ganer v. Lady Lanesborough, Peake*, 17; but Lord Kenyon permitted the party divorced to give parol evidence of her divorce at Leghorn, according to the ceremony and custom of the Jews there. *Ibid.*

Proof of Entries in Public Books, &c.

Whenever an original is of a public nature, and admissible as such in evidence, an examined copy is also admissible. *Lynch v. Clerke*, 3 *Salk.* 154. Thus examined copies of the entries in the council book, or of a licence preserved in the secretary of state's office; *Eyre v. Palsgrave*, 2 *Campb.* 606; of entries in the bank books; *Marsh v. Collnett*, 2 *Esp.* 665; of a bank note filed at the bank; *Mann v. Carey*, 3 *Salk.* 155; of entries in the books of the East India Company; *Dougl.* 593 (*n*); or in the books of the commissioners of land tax; *R. v. King*, 2 *T. R.* 234; or of excise; *Fuller v. Fotch, Carth.* 346; or of a poll book at an election; *Mead v. Robinson, Willes*, 424; or of a book kept in the chapter-house of a dean and chapter, purporting to contain copies of leases; *Coombs v. Coether, M. and M.* 398; are good evidence; and in one case a copy of an agreement contained in one of the books of the Bodleian library (which cannot be removed) was allowed to be read in evidence. *Downes v. Moreman*, 2 *Gwill.* 659. An examined copy of a parish register is evidence; *B. N. P.* 247; but an examined copy of the register of a marriage in the Swedish ambassador's chapel at Paris, is not evidence. *Leader v. Barry*, 1 *Esp.* 353. It seems that the books of the King's Bench and Fleet prisons (which are evidence of the *time* of a prisoner's discharge) are not such public documents as that a copy of them may be given in evidence. *See Salte v. Thomas*, 3 *B. and P.* 190. The genuineness of the post-office mark

may be proved by any postmaster; *Fletcher v. Braddyll*, *Stark. Ev. App. p.* 853, 1*st. ed.*; or, as it seems, by any one who is in the habit of receiving letters by the post. *Abbey v. Lill*, 5 *Bingh.* 299.

Proof of Entries in Corporation Books.

Corporation books are allowed to be given in evidence when they have been publicly kept as such, and when the entries have been made by the proper officer, or by a third person, in the absence or sickness of the proper officer. *R. v. Mothersell*, 1 *Str.* 92. A book kept by the prosecutor's clerk, who was not an officer of the corporation, containing minutes of corporate proceedings, but which had not been kept as the public book of the corporation, was rejected in evidence. *Ibid.* If the books are ancient, it must be shown that they come from the proper custody, as from a chest which has always been in the custody of the clerk of the corporation; *Mercers of Shrewsbury v. Hart*, 1 *Carr. and P.* 114; it is not sufficient that they are brought from a chest found in the house of a former clerk after his death. *Ibid.* Where, in order to prove a person a freeman of Evesham, a copy upon a two shilling stamp was produced, of a loose paper upon a file, which the witness said was also on a two shilling stamp, and it appeared that there was a book in which the acts of the corporation were kept, and where there was an entry more at large of the freeman's admission, and which was made when the freeman was originally admitted, but this was not on a stamp in the book, it was held by Noel, J., that the loose paper being the only effectual act, as having that which the law requires, *viz.* the proper stamp, must be looked upon as the proper and original act of the corporation, and that a copy of it was good evidence. *R. v. Head, Peake, Ev.* 92 (*n*). Corporation books may be proved by examined copies; *Brocas v. Mayor, &c. of London*, 1 *Str.* 308; but if they do not relate to corporate acts the original must be produced. *R. v. Gynn*, 1 *Str.* 401.

Proof of Public Registers.

Registers of baptisms, marriages, and deaths, may be proved by examined copies, or by production of the register itself. *B. N. P.* 247. *See* 52 *Geo.* 3, *c.* 146. The copy need not be stamped. *Id. s.* 17. *Vivâ voce* proof of the contents of a register has been admitted without a copy; but it was observed by Mr. Justice Buller, that the propriety of such evidence may well be doubted, because it is not the best evidence the nature of the thing is capable of. 2 *Evans's Poth.* 139. In order to prove the register of a marriage, it is not necessary to call the attesting witnesses; but as the register affords no proof of the identity of the parties, some evidence of that fact must

be given, as by calling the minister, clerk, or attesting witnesses, if they were acquainted with the parties; or the bell-ringers may be called to prove that they rang the bells, and came immediately after the marriage, and were paid by the parties; or the handwriting of the parties may be proved; or persons may be called who were present at the wedding dinner, &c. *Birt v. Barlow, Dougl.* 172. To prove the handwriting of the parties in the register, it is not necessary to call the subscribing witness. *Per Lord Mansfield, Dougl.* 174. If a marriage is proved by a person who was present, it is not necessary to prove the registration, or license, or banns. *Allison's case, R. and R., C. C. R.* 109.

Proof of Ship's Register.

By stat. 6 Geo. 4, c. 110, s. 43, it is enacted, "that the collector and comptroller of his majesty's customs at any port or place, and the person or persons acting for them respectively, shall, upon every reasonable request by any person or persons whomsoever, produce and exhibit, for his, her, or their inspection and examination, any oath or affidavit taken or sworn by any owner or owners, proprietor or proprietors, (of the vessels mentioned in the act,) and also any register or entry in any book or books of registry required by that act to be made or kept, relative to any ship or vessel; and shall, upon every reasonable request by any person or persons whomsoever, permit him, her, or them to take a copy or copies, or an extract or extracts thereof respectively, and that the copy or copies of any such oath or affidavit, register or entry, shall, upon being proved to be a true copy or copies thereof respectively, be allowed and received as evidence upon every trial at law, without the production of the original or originals, and without the testimony or attendance of any collector or comptroller, or other person or persons acting for them respectively, in all cases as fully, and to all intents and purposes, as such original or originals, if produced by any collector or collectors, comptroller or comptrollers, or other person or persons acting for them, could or might legally be admitted or received in evidence."

Proof of Terriers.

An old terrier or survey is not in general admissible in evidence without proof of its having come from the proper repository. 1 *Stark. Ev.* 170, 1*st ed.* So an old grant to an abbey, contained in a manuscript entitled "Secretum Abbatis," in the Bodleian library, was rejected, as not coming from the proper repository. *Michell v. Rabbetts, cited* 3 *Taunt.* 91. So an ancient grant to a priory, from the Cottonian manuscripts in the British Museum, was rejected, it not appearing that the possession of the grant was connected with any person having

an interest in the estate. *Swinnerton v. Marquis of Stafford*, 3 *Taunt.* 91. With regard to ecclesiastical terriers, the proper repository for them is the registry of the bishop, or of the archdeacon of the diocese; *Atkins v. Hutton*, 2 *Anstr.* 386, *Potts v. Durant*, 3 *Anst.* 795; or the church chest, *Armstrong v. Hewitt*, 4 *Price*, 218; and a terrier found in the registry of the dean and chapter of Lichfield has been admitted as against a prebendary of Lichfield; *Miller v. Forster*, 2 *Anstr.* 387 (*n*); but merely private custody is not sufficient. *Potts v. Durant*, 3 *Anstr.* 789. *See also Atkins v. Drake, M'Cl. and Y.* 213. On an issue to try the boundaries of two parishes, an old terrier or map of the limits, drawn in an inartificial manner, brought from a box of old papers relating to the parish, in the possession of the representatives of the rector, was rejected, it not being signed by any person bearing a public character or office in the parish. *Earl v. Lewis*, 4 *Esp.* 3. So an ancient map of a manor, belonging to the lord of the manor, was rejected in a tithe suit between the vicar and an occupier. *Newcome v. Matthews*, 5 *Simons*, 243. In a suit for tithes by a rector against occupiers, the defendants pleaded a modus to be payable to the vicar, for the tithes claimed. It was held, first, that a copy of a vicar's endowment, contained in an old book, recording the acts of former bishops of the diocese, was admissible for the plaintiff, (the bishop's registry having been searched for the original without success,) and that no search was necessary either in the augmentation office, or in the vicar's house, although it was expressed in the instrument that one part of it was to remain with the vicar; secondly, that a terrier appearing to be signed by a former incumbent, who was both rector and vicar of the parish, and whose handwriting was proved by the churchwardens, was admissible for the plaintiff, though it was produced from the custody of an individual who claimed the tithes of a particular district in the parish, and not from the usual depositories. *Tucker v. Wilkins*, 4 *Simons*, 241.

Proof of Deeds and Writings.

Production of instrument under subpœna duces tecum.] A witness served with a *subpœna duces tecum*, must be ready to produce the writings in his possession, if ordered by the court; *Amey v. Long*, 9 *East*, 473; but if the production would have a tendency to subject him to a criminal charge, or to a penalty or forfeiture, the court will excuse the non-production. *See Whitaker v. Izod*, 2 *Taunt.* 115. So if he state that they are his title-deeds, no judge will ever compel him to produce them. *Per Cur. Pickering v. Noyes*, 1 *B. and C.* 263; *and see R. v. Upper Boddington*, 3 *D. and R.* 726. The solicitor to a commission of bankrupt is bound under this *subpœna* to produce the proceedings under the commission; *Pearson v. Fletcher*,

5 *Esp.* 91; *Corsen v. Dubois, Holt*, 239; *Cohen v. Templar*, 2 *Stark.* 260; *Hawkins v. Howard, R. and M.* 64; *but see Bateson v. Hartsink*, 4 *Esp.* 43; *Laing v. Barclay*, 3 *Stark.* 42, *contra*; unless the production be prejudicial to the assignees. *Per Gibbs, C. J., Corsen v. Dubois, Holt*, 240. But where the attorney had received it back again from the commissioners, under an undertaking to produce it, it was held that he would not be compelled to produce it on a trial in which the assignees were plaintiffs, the production of the deed having been in the first instance improperly obtained by the commissioners. *Nixon v. Mayoh*, 1 *Moo. and Rob.* 76. An attorney, who is also steward of the lord of a borough, is bound, under a *subpœna duces tecum*, to produce public documents in his possession as steward, but not documents in his possession as attorney, relating to the lord's interest in the borough, as a case with counsels' opinion. *Rex v. Woodley*, 1 *Moo. and Rob.* 390. An attorney is not bound to produce a composition deed in which his client is interested, and the production of which he conceives may be prejudicial to his client, in a suit between other parties. *Harris v. Hill*, 3 *Stark.* 140. *Ditcher v. Kenrick*, 1 *C. and P.* 161. *Vide post.* A person producing papers under a *spa. duc. tec.* need not be sworn. *Davis v. Dale, M. and M.* 514. *Perry v. Gibson*, 1 *Ad. and Ell.* 48, 3 *Nev. and M.* 462, *S. C.* *Evans v. Moseley*, 2 *Crom. and M.* 490.

Attesting witness must be called.] Wherever a deed or other instrument is subscribed by an attesting witness, such witness must be called to prove the execution; and his testimony cannot be dispensed with, though the defendant has admitted the execution, in his answer to a bill in Chancery. *Call v. Dunning*, 4 *East*, 53; *but see Bowles v. Langworthy*, 5 *T. R.* 366. A notice to quit; *Doe v. Durnford*, 2 *Maule and S.* 62; or a warrant to distrain; *Higgs v. Dixon*, 2 *Stark.* 180, if attested, must be proved by calling the attesting witness.

But where the attesting witness is dead, *Anon.* 12 *Mod.* 607, or blind, *Wood v. Drury*, 1 *Ld. Raym.* 734; *Pedler v. Paige*, 1 *Moo. and Rob.* 258; or insane, *Currie v. Child*, 3 *Campb.* 283, or infamous, *Jones v. Mason*, 2 *Str.* 833, or absent in a foreign country, or not amenable to the process of the superior courts, *Prince v. Blackburn*, 2 *East*, 252, as in Ireland, *Hodnett v. Forman*, 1 *Stark.* 90, or where he cannot be found after diligent inquiry, *Cunliffe v. Sefton*, 2 *East*, 183, evidence of the witness's handwriting is admissible. With regard to the inquiry necessary to let in such evidence, it has been held, that an inquiry after an attesting witness to a bond, at the residences of the obligor and obligee, is sufficient, *ibid.*; so diligent inquiry at the witness's usual place of residence, and information there, and from the witness's father, that he had absconded to avoid his creditors. *Crosby v. Percy*, 1 *Campb.* 303, 1 *Taunt.*

365, *S. C.; but see Pytt v. Griffiths, 6 B. Moore*, 538, *contra*. So, that a twelvemonth since, a commission of bankrupt issued against the witness, to which he had not appeared. *Wardell v. Farmer, 2 Campb.* 282. So, that on inquiry after the witness at the admiralty, it appeared by the last report, that he was serving on board of some ship. *Parker v. Hoskins, 2 Taunt.* 223. So that the witness went abroad twenty years ago, and has never been heard of since. *Per Ld. Ellenborough, Doe v. Johnson, 1 Phill. Ev.* 455 (*n*); *vide ante p.* 22. A witness, being subpœnaed, said he would not attend, and the trial was twice put off in consequence of his absence; search was then made at the defendant's house, and in the neighbourhood; and upon information at the defendant's that the witness was gone to Margate, inquiry was made there without success. It was held that, under these circumstances, evidence of his handwriting was admissible. *Burt v. Walker, 4 B. and A.* 697. So, it was held sufficient to show that the witness, some time before, had expressed an intention of leaving the country, that he had reason for so doing, to avoid a criminal charge, and that his relations had not seen him since he expressed his intention of going. *Kay v. Brookman, 3 C. and P.* 555. *See also Morgan v. Morgan, 9 Bingh.* 359. In these cases it seems sufficient to prove the handwriting of the witness, without proving the handwriting of the party, unless with a view to establish the identity of the party; but slighter evidence of that fact would be sufficient. *See Nelson v. Whittall, 1 B. and A.* 19. *Gough v. Cecil, MS. cited Selw. N. P.* 516 (*n*). Indeed identity of name has been held sufficient evidence of the identity of the parties; *Page v. Mann, M. and M.* 79; *Kay v. Brookman, Id.* 286, 3 *C. and P.* 555, *S. C.*; even where the defendant has signed only by his mark. *Mitchell v. Johnson, M. and M.* 176. But these cases have been reviewed by the Court of Exchequer, and it has been held that some proof of identity is necessary, and that mere identity of name is not sufficient. *Whitelocke v. Musgrove, 1 C. and M.* 511, 3 *Tyr.* 541. *S. C.* It seems however that where the attestation states the residence of the party, proof that the party sued resided there would be *primâ facie* evidence of identity. *Id.* It is not sufficient ground for admitting evidence of the witness's handwriting, that he is unable to attend from illness, and lies without hope of recovery. *Harrison v. Blades, 3 Campb.* 457. *See Doe v. Evans, 3 C. and P.* 221.

Where the witness was incompetent at the time of the attestation, as where he was interested at that time, *Swire v. Bell, 5 T. R.* 371, it is the same in effect as if the instrument had never been attested; and it will be necessary to prove the handwriting of the party who has executed it. But if a party knowing the witness to be interested, requests him to attest the instrument, he cannot afterwards object to his competency.

Honeywood v. Peacock, 3 *Campb.* 196. Where the witness becomes interested *after* the attestation, a distinction is to be observed. In general, proof of the handwriting of the witness will be admitted, as where the witness becomes interested as administrator; *Godfrey v. Norris*, 1 *Str.* 34, *Cunliffe v. Sefton*, 2 *East*, 183; or by marriage with one of the parties. *Buckley v. Smith*, 2 *Esp.* 697. So, as it seems, where a man enters into partnership, and becomes interested in instruments which he has attested, by acquiring a share in the credits, and taking upon himself the responsibilities of the firm, his handwriting may be proved. *See Hovill v. Stephenson*, 5 *Bingh.* 496. But where the plaintiff in an action on a charter-party had communicated to the attesting witness an interest in the adventure, subsequently to the execution of the instrument, it was held that evidence of his handwriting was inadmissible. *Hovill v. Stevenson*, 5 *Bingh.* 493. Where the name of a fictitious person is inserted as witness; *Fasset v. Brown*, *Peake*, 23; or where the subscribing witness denies any knowledge of the execution, *Talbot v. Hodson*, 7 *Taunt.* 251; (*overruling Phipps v. Parker*, 1 *Campb.* 412); *Fitzgerald v. Elsee*, 2 *Campb.* 635; *Lemon v. Dean*, *Id.* 636 (*n*); *Boxer v. Rabeth*, *Gow*, 175; or where the attesting witness subscribes his name without the knowledge or consent of the parties; *M'Craw v. Gentry*, 3 *Campb.* 232; in these cases it becomes necessary to prove the instrument by calling some one acquainted with the handwriting of the party executing it; or who was present at the time of execution.

Where there are two attesting witnesses, and one of them is incompetent, or his evidence cannot be obtained, the other witness must be called, and evidence of the handwriting of the former witness will not be sufficient. *See Cunliffe v. Sefton*, 2 *East*, 183. But where a bond is attested by two witnesses, and one of them is dead, and the other beyond the reach of the process of the court, proof of the handwriting of the witness that is dead is sufficient. *Adam v. Kerr*, 1 *B. and P.* 360.

Execution, how proved.] In attesting a deed, it is not essentially necessary that the witness should see the party sign or seal; if he sees him deliver it, already signed and sealed, or sealed only, it will be sufficient. 1 *Phill. Ev.* 448. Thus, proof by the attesting witness that she was not present when the deed was executed, but that she was afterwards requested by one of the parties to sign the attestation, is sufficient evidence of the execution of the deed by such party; *Grellier v. Neale*, *Peake*, 146; and witnesses may be called to prove the handwriting of the remaining parties, in which case sealing and delivery may be presumed. *Ibid.* It is not necessary for the attesting witness to prove that certain blanks which existed in the deed were filled up at the time of execution.

England v. *Roper*, 1 *Stark*. 304. Where a party executes a deed with a blank in it, which is afterwards filled up with his assent, and he subsequently recognises the deed as valid, the filling up of the blank will not avoid it. *Hudson* v. *Revett*, 5 *Bingh*. 368; *and see Hall* v. *Chandless*, 4 *Bingh*. 123. Some proof of the identity of the party executing the instrument must be given; and therefore, where the witness to a bond stated that he saw it executed by a person who was introduced under the name of Hawkshaw (the name of the defendant), but could not identify him with the defendant, the plaintiff was nonsuited. *Parkins* v. *Hawkshaw*, 2 *Stark*. 239. *Middleton* v. *Sandford* 4 *Campb*. 34. *Sed vide Hennell* v. *Lyon*, 1 *B. and A*. 182, *ante p*. 74. Where a bond was executed by the defendant, and attested by a witness in one room, and was then taken into an adjoining room, and at the request of the defendant's attorney, and in the defendant's hearing, was attested by another witness, who knew the defendant's handwriting, it was held that the execution might be proved by the latter witness, the whole being considered as one entire transaction. *Park* v. *Mears*, 2 *B. and P*. 217; *and see Anon. MS. Archb. Pl. and Ev*. 378. In proving the execution of a deed, the attesting witness frequently states that he does not recollect the fact of the deed being executed in his presence; but that, seeing his own signature to it, he has no doubt that he saw it executed; and this has always been received as sufficient proof of the execution. *Per Bayley, J., Maugham* v. *Hubbard*, 2 *Mann. and R*. 7, 8 *B. and C*. 16, *S. C. Per Taunton, J., R.* v. *St. Martin, Leicester*, 4 *Nev. and M*. 204.

The sealing of the deed need not take place in the presence of the witness; it is sufficient if the party acknowledge an impression, already made, to be his seal. Where one partner, in the presence of his copartner, executed a deed for both, but there was only one seal, and it did not appear whether the seal had been put twice upon the wax, it was held, that no particular mode of delivery was requisite, and that it was sufficient if a party executing a deed treated it as his own. *Ball* v. *Dunsterville*, 4 *T. R*. 313. But where a deed is executed under the authority of a power, requiring it to be under the hands and seals of the parties, the parties must use separate seals. Thus, by stat. 8 and 9 Will. 3, c. 30, certificates are required to be under the hands and seals of the overseers and churchwardens; and it was held that a certificate signed by two churchwardens and one overseer, but bearing two seals only, was not a valid certificate. *R.* v. *Austrey*, 1 *Phill. Ev*. 453, 6 *M. and S*. 319, *S. C*. The circumstance of a party writing his name opposite to the seal, on an instrument which purports to be sealed and delivered by him, is evidence of a sealing and delivery to go to a jury. *Talbot* v. *Hodson*, 7 *Taunt*. 251. So when a witness is dead, proof of the handwriting of

such witness is evidence of every thing on the face of the paper which imports to be sealed by the party. *Per Buller, J., Adams v. Kerr,* 1 *B. and P.* 361; *and see Grellier v. Neale, Peake,* 146.

In the delivery of a deed no particular form is necessary. Throwing down the deed upon a table, with the intent that the other party shall take it up, is sufficient. *Com. Dig. Fait,* (*A.* 3). Affixing the common seal is a sufficient delivery of a deed by a corporation. *Ibid.* But in debt on bond against an incorporated company, where it is shown that the bond has been sealed with the seal of the company by the proper officer, it is competent to the defendants, under the plea of *non est factum,* to prove that several of the requisitions of the act, necessary to the validity of the execution, have not been complied with. *Hill v. Manchester and Salford Waterworks Company,* 2 *Nev. and M.* 573. Where a deed is delivered by virtue of a power of attorney, the power should be produced. *Johnson v. Mason,* 1 *Esp.* 89. In some instances a general agent has been presumed to have such authority. *Doe v. East London W. W. Comp., M. and M.* 149. But, in general, the agent must be authorised by deed. *Berkeley v. Hardy,* 8 *D. and R.* 102. A condition previously expressed, though not introduced into the act of delivery, is sufficient to make the delivery of the deed as an escrow. *Per Abbott, C. J., Johnson v. Baker,* 4 *B. and A.* 441 ; *and see Murray v. Earl of Stair,* 2 *B. and C.* 82. Where a person delivers a deed in the presence of a witness, but retains it in his own possession, there being nothing to show that it was not intended to operate immediately, it will take effect as a deed, and not as an escrow ; and the delivery of a deed to a third party, for the use of the party in whose favour the deed is executed, is good, though that party be not the agent of the latter. *Doe v. Knight,* 5 *B. and C.* 671. Where A. executes an instrument, and delivers it to B. as an escrow, to be delivered to C., on a certain event, possession by C. is *primâ facie* evidence of the performance of the condition. *Hare v. Horton,* 2 *Nev. and M.* 428.

Where a deed was executed by the defendant, a marksman, and the attesting witness was abroad, proof of the handwriting of the witness, and that the defendant had spoken of the term which he took under the deed, was held sufficient. *Doe v. Paul,* 3 *C. and P.* 613. So the mark may be proved by a person who has seen the party make his mark, and can speak to it. *George v. Surrey, M. and M.* 516.

Where after one party has executed a deed, another party present objects to a clause, which is struck out, and the deed is re-executed, it is in *fieri,* and does not require a fresh stamp. *Jones v. Jones,* 1 *Crom. and M.* 721.

Proof of handwriting.] The handwriting of a party may be

proved by a witness who has seen him write; and, if a witness states that he has only seen him write once, but thinks the signature is his writing, it is evidence to go to the jury, though he says that he can form no belief on the subject. *Garrels v. Alexander*, 4 *Esp.* 37. But where the witness had only once seen the party write, and then for the purpose of making him a witness in the suit, he was rejected by Lord Kenyon. *Stranger v. Searle*, 1 *Esp.* 15. And where the witness stated that he had merely seen the witness subscribe his name to another instrument, to which he was the attesting witness, and was unable to form an opinion respecting the handwriting, without examining such other instrument, it was held insufficient. *Filliter v. Minchin, Manning's Index*, 131. However, a witness who has seen a party write, but has forgotten the character of the handwriting, may refresh his memory by referring to the instrument which he saw the party write. *Burr v. Harper, Holt*, 420. It was held by Lord Ellenborough, that the full signature of an acceptor was not sufficiently proved by a witness who had seen him write his name but once before, when he used only the initial of his Christian name. *Powell v. Ford*, 2 *Stark.* 164. But in a late case, Abbott, C. J., said, that he would not abide by that decision; and ruled that a witness who had seen the defendant write his name "Mr. Sapio," was competent to prove the signature to a bill, "L. B. Sapio." *Lewis v. Sapio, M. and M.* 39. *See Smith v. Sainsbury*, 5 *C. and P.* 196.

A written correspondence with the party, although the witness has never seen him write, will be sufficient to enable him to speak to the handwriting; for when letters are sent directed to a particular person, and on particular business, and an answer is received in due course, a fair inference arises that the answer was sent by the person whose handwriting it purports to be. *Per Lord Kenyon, Cary v. Pitt, Peake, Ev. App.* 86; *and see Tharpe v. Gisburne*, 2 *C. and P.* 21. So where a witness who had never seen the defendant, but had corresponded with a person of the defendant's name living in Plymouth Dock, where the defendant resided, and where, according to other evidence, there was no other person of the same name, stated that the handwriting in question was the handwriting of the person with whom he corresponded, the evidence was held sufficient. *Harrington v. Fry, R. and M.* 90. A witness who has received letters from the party, in answer to letters written to him by the witness, may prove the handwriting, though the witness has never done any act in consequence of the receipt of such letters. *Doe v. Wallinger, Manning's Index*, 131. To prove the handwriting of a member of parliament, the opinion of a clerk employed to inspect franks, who never had occasion to apply to the member to verify his handwriting,

has been held insufficient. *Batchelor v. Sir J. Honeywood*, 2 *Esp*. 714. *Cary v. Pitt, Peake, Ev. App*. 84.

A comparison of handwritings, without any other knowledge of the character of the handwriting, furnishes no evidence. *See Macferson v. Thoytes, Peake*, 20. *Greaves v. Hunter*, 2 *C. and P*. 477. Though a witness, who has seen a party write, may refer to that writing to retouch and strengthen his recollection, and not merely for the purpose of comparison. *Burr v. Harper, Holt*, 420, *supra*. And in the case of ancient documents, where it is impossible for a witness to swear that he has seen the party write, it is sufficient if the witness has acquired his knowledge of the handwriting by the inspection of other ancient writings bearing the same signature, and preserved as authentic documents. *B. N. P*. 236. *Taylor v. Cook*, 8 *Price*, 652. *Roe v. Rawlings*, 7 *East*, 282 (*n*). But where there is no proof or presumption that the document, with which the instrument produced has been compared, was written by the party whose handwriting is to be proved, the evidence of the witness who compared them is inadmissible. *Randolph v. Gordon*, 5 *Price*, 312. Authentic ancient writings may be laid before a witness at the trial for his inspection; and after forming a judgment of their character, his belief, as to the handwriting of the document in question, may be inquired into. *Doe v. Tarver, R. and M*. 143; *and see Brune v. Rawlings*, 7 *East*, 282. In several cases, where the fact of the genuineness of certain handwriting has been in question, persons skilled in the examination of handwriting, and in the detection of forgeries, have been allowed to state their opinions, whether a particular writing is in a genuine or imitated character; *Goodtitle v. Braham*, 4 *T. R*. 497; *R. v. Cator*, 4 *Esp*. 117, 145, *Stranger v. Searle*, 1 *Esp*. 14; but such evidence has been rejected at *nisi prius*; and doubts have been expressed by some of the judges of the King's Bench as to its admissibility. *Gurney v. Langlands*, 5 *B. and A*. 330; *and see Cary v. Pitt, Peake's Ev. App*. 85.

Where the question was, whether the acceptance of a bill was forged or genuine, Lord Kenyon allowed other bills, admitted to be the genuine handwriting, to be handed to the jury for the purpose of comparison. *Allesbrook v. Roach*, 1 *Esp*. 351. And in *Griffith v. Williams*, 1 *Crom. and Jer*. 47, it was held that the rule as to the comparison of handwriting applies only to witnesses, who compare a writing to which they are examined with the character of the handwriting impressed upon their own minds; but that it doer not apply to the court or jury, who may compare the two documents when they are properly in evidence. But the documents with which the handwriting is compared must be such as are in evidence for other purposes in the cause, and not selected by the party for

the comparison. *Morgan's case*, 1 *Moo. and Rob.* 134 (*n*). *See also Allport v. Meek*, 4 *C. and P.* 267.

Where a party to a deed directs another person to write his name for him, and he does so, that is a good execution by the party himself. *R. v. Longnor*, 4 *B. and Ad.* 647, 1 *Nev. and M.* 576, *S. C.* And it is not necessary that the deed should be previously read over to him unless he requires it. *Id.*

Proof of execution, when dispensed with.] Where a deed is thirty years old it proves itself, and no evidence of its execution is necessary; *B. N. P.* 255; and so with regard to receipts coming from the proper custody; *Wynne v. Tyrwhitt*, 4 *B. and A.* 376; letters; *Beer v. Ward*, 1 *Phill. Ev.* 458; a will produced by the officer of the Ecclesiastical Court; *Doe v. Lloyd, Peake, Ev. App.* 91; a bond; *Chelsea W. W. v. Cowper*, 1 *Esp.* 275; *see Forbes v. Wale*, 1 *Blackst.* 532; and other old writings. *Fry v. Wood, Selw. N. P.* 517 (*n*). Where an old deed is offered in evidence, without proof of execution, some account ought to be given of its custody; *B. N. P.* 255; or it should be shown that possession has accompanied it. *Gilb. Ev.* 97. But it has been held sufficient to produce a certificate of settlement thirty years old, without showing that it had been kept in the parish chest. *R. v. Ryton*, 5 *T. R.* 259. Even if it appear that the attesting witness is alive, and capable of being produced, it is unnecessary to call him where the deed is thirty years old. *Marsh v. Collnett*, 2 *Esp.* 665; *B. N. P.* 255; *and see Rees v. Mansell, Selw. N. P.* 517; *Doe v. Wolley*, 8 *B. and C.* 22. If there is any rasure or interlineation in an old deed, it ought to be proved in the regular manner by the witness, if living, or by proof of his handwriting, and that of the party, if dead. *B. N. P.* 255. Whether a document, above thirty years old, sealed with the seal of a corporation, proves itself, does not appear to be settled. *R. v. Bathwick*, 2 *B. and Adol.* 648.

Where a party producing a deed, under a notice to produce, claims a beneficial interest under it, it will not be necessary for the party calling for the deed to prove the execution of it. *Pearce v. Hooper*, 3 *Taunt.* 62. *Orr v. Morice*, 3 *B. and B.* 139. Thus, in an action by a lessee against the assignee of a lease, the plaintiff having proved the execution of a counterpart of the lease, and the defendant having put in the original lease, which was produced by a party to whom he had assigned it, it was held to be unnecessary for the plaintiff to call the subscribing witness to prove the execution of the original lease. *Burnett v. Lynch*, 5 *B. and C.* 589. So in an action against the vendor of an estate, to recover a deposit on a contract for the purchase, if the defendant on notice produces the contract, the plaintiff need not prove its execution. *Bradshaw v. Bennett*, 1 *Moo. and Rob.* 143, 5 *C. and P.* 48, *S. C.* And where, in

ejectment, the attorney for the lessor of the plaintiff obtained from one of the defendants a subsisting lease of the premises, to prevent its being set up by the defendants, it was held that this was a recognition of the lease as a valid instrument; and that, when produced in pursuance of notice from the defendants, it might be read without proof of execution. *Doe v. Heming*, 6 *B. and C.* 28, 9 *D. and R.* 15, *S. C.* Where the party producing the deed claims an interest under it, it is immaterial that the party calling for it denies its validity. *Carr v. Burdiss*, 1 *Crom. M. and R.* 782. Where the party producing the deed does not claim an interest under it, the party calling for it must prove it in the regular manner. *Ibid. Gordon v. Secretan*, 8 *East* 548. And a party producing, at the trial of a cause, a deed *which has been some months in his possession*, is not excused from proving the execution because he received such deed from the adverse party who formerly claimed a beneficial interest in it. *Vacher v. Cocks*, 1 *B. and Ad.* 145.

In an action against a sheriff for taking insufficient pledges in replevin, the replevin bond produced by the defendant is admissible in evidence against him, without proof of execution. *Scott v. Waithman*, 3 *Stark.* 169; *and see Barnes v. Lucas*, *R. and M.* 264.

A deed may be given in evidence under a rule of court without proof of execution, for the consent is conclusive. *B. N. P.* 256. So if the execution of the deed be one of the admissions in the cause, *ante p.* 36; or if money has been paid into court on the count in which the deed is stated, *ante p.* 43, the execution need not be proved.

Where the plaintiff declared on a deed, which he averred to be in the possession of the defendant, who pleaded *non est factum*, and at the trial the deed was proved to be in the hands of the defendant, who had been served with notice to produce, it was held, that on the non-production of the deed, the plaintiff might give parol evidence of the contents, without calling the subscribing witness, who was in court. *Cook v. Tanswell*, 8 *Taunt.* 450, 2 *B. Moore*, 513, *S. C. Jackson v. Allen*, 3 *Stark.* 74. So where the plaintiff declared on a lost bond, and a witness stated that there were subscribing witnesses' names to the bond, but that he did not know the names, it was ruled by Lord Kenyon, that the plaintiff might recover without calling either of the attesting witnesses. *Keeling v. Ball*, *Peake, Ev. App.* 82. But if the witnesses are known they must be called. *Gillies v. Smither*, 2 *Stark.* 528.

Where a deed requiring inrolment by statute is accordingly inrolled, proof of the inrolment by a copy examined with the inrolment, will dispense with evidence of the execution by any of the parties to the deed. *Thurle v. Madison*, *Styles*, 462. *Smartle v. Williams*, 3 *Lev.* 387, 1 *Salk.* 280, *S. C. B. N. P.* 255.

2 *Evans's Poth.* 155. 10 *Ann, c.* 18. *s.* 3. So where a deed not requiring inrolment is inrolled on the acknowledgment of one of the parties, it seems to be evidence against that party, without calling the attesting witnesses. *Ibid.*

Custody of ancient writings.] In general the admissibility of ancient writings, which are incapable of direct proof, depends upon the custody from which they are produced, and which furnishes ground of authentication. Thus ancient ecclesiastical terriers are not admissible, unless found in the proper repository, viz., the registry of the bishop, or of the archdeacon of the diocese; *ante p.* 81; or, as it seems, the church chest; *Armstrong v. Hewitt,* 4 *Price,* 216; which are also the proper repositories for the vicar's books. *Ibid. See Tucker v. Wilkins,* 4 *Sim.* 241, *ante p.* 81. On an issue respecting the boundaries of two parishes certain old papers were produced by the plaintiff (the rector of one of the parishes), which had come into the possession of the son of a former rector, on his father's death, and which had been delivered by him, as papers belonging to the parish, to the witness (an attorney), and it was held that the papers were sufficiently authenticated without calling the son of the former rector. *Earl v. Lewis,* 4 *Esp.* 1. But where a book, purporting to be the book of a former rector, came out of the custody of the defendant, the grandson of the former rector, the proof was held insufficient, it not appearing how it came into the defendant's possession. *Randolph v. Gordon,* 5 *Price,* 312. In a suit for tithes, a receipt purporting to be a receipt given by a former rector, forty-five years ago, to a person of the same name as the defendant, and produced from the custody of the defendant, has been held admissible. *Bertie v. Beaumont,* 2 *Price,* 303. An ancient writing, enumerating the possessions of a monastery, produced from the Heralds' Office, is inadmissible. *Lygon v. Strutt,* 2 *Anstr.* 601; *and see Potts v. Durant,* 3 *Anstr.* 789, *ante p.* 81. And where A., the defendant in a tithe suit, offered in evidence a receipt, purporting to be a receipt from one B. to one A., fifty years before, without showing who B. was, or where the paper had been kept, it was rejected. *Manby v. Curtis,* 1 *Price,* 225, *Wood B. diss.; see also Bullen v. Michel,* 2 *Price,* 399.

Proof of Wills.

Production of the will.] In order to prove a devise of lands the will itself must be produced; an exemplification, or probate of the will is not evidence. *B. N. P.* 246. *Comb.* 46. If the will is lost the register book, or ledger book; *St. Legar v. Adams,* 1 *Ld. Raymond,* 731; *B. N. P.* 246; 1 *Phill. Ev.* 478; or an examined copy, or if there be no such copy, parol evidence may be received, as secondary evidence of its contents,

but the probate will not be received as such evidence. *Doe v. Calvert*, 2 *Campb.* 389.

What witnesses must be called.] To prove a will in a court of law it is sufficient to call one of the witnesses, if he can speak to all the requisites of attestation; *B. N. P.* 264. *Longford v. Eyre*, 1 *P. Wms.* 741; but on an issue out of Chancery, all the witnesses ought to be called. *Bootle v. Blundell*, 19 *Ves.* 494, 1 *Cooper*, 136. Though this is the rule in cases where the suit is instituted by the devisee, to establish the will, yet where the suit is by the heir against the devisee, for the purpose of setting aside the will, the devisee will not be required to produce all the witnesses. *Tatham v. Wright*, 2 *Russ. and My.* 1. And even where the suit is by the devisee, it would not be unreasonable in some cases, to depart from the general rule, as where it is known that some of the witnesses will contradict the effect of their own attestations. *Id.* 17.

Upon the trial of an ejectment brought for the recovery of the same lands as those mentioned in the above case, one of the attesting witnesses, who proved the will on the issue out of Chancery, having died, the defendant proved his testimony from the short-hand writer's notes, which was held to be sufficient evidence of the execution of the will, though another attesting witness was present at the trial of the ejectment. The proceedings in the Court of Chancery were held not to be evidence of the execution of the will, as not creating an estoppel, and therefore not a *primâ facie* case. *Wright v. Tatham*, 1 *Ad. and Ell.* 1, 3 *Nev. and M.* 268, *S. C.*

Signing by the devisor.] By the statute of frauds, 29 Ch. 2, c. 3, s. 5, all devises and bequests of lands or tenements shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express directions; (1 *C. and M.* 176;) and shall be attested and subscribed, in the presence of the devisor, by three or four credible witnesses, or else shall be utterly void and of none effect. Notwithstanding some earlier cases to the contrary, it seems to be now the established rule, that sealing, without signing, is not a sufficient execution within the statute. *Smith v. Evans*, 1 *Wils.* 313. *Grayson v. Atkinson*, 2 *Ves. sen.* 459. *B. N. P.* 263. 1 *Phil. Ev.* 480. It is sufficient if the testator sign his name at the beginning of the will. *Lemayne v. Stanley*, 3 *Lev.* 1, 1 *Freem.* 538, *S. C.* If the will is written on several sheets, and the testator signs some, and intends to sign the rest, but does not, this is not a sufficient execution; *Right v. Price*, *Dougl.* 241; but where a will, written on three sides of a sheet of paper, concluded by stating that the testator had signed his name to the first two sides, and had put his hand and seal to the last, and in fact he had put his hand and seal to the last,

but had omitted to sign the two other sides, the execution was held good, the signing of the last sheet showing that the former intention had been abandoned. *Winsor v. Pratt*, 2 *B. and B.* 650. Where a codicil was duly executed and attested by three witnesses, and written on the same paper with an unexecuted will, to which it expressly referred, it was held that such execution gave effect to the will, and that it thereby became a good will of lands. *Doe v. Evans*, 1 *C. and M.* 42, 3 *Tyr.* 56, *S. C.* But a codicil may operate as a partial re-publication only. *Monypenny v. Bristow*, 2 *Russ. and M.* 117. Where the testator is blind, it is not necessary to read over the will in the presence of the attesting witnesses previously to execution. *Longchamp v. Fish*, 2 *Bos. and Pul. N. R.* 415.

Attestation.] The statute does not direct that the witnesses shall *see* the testator sign; and therefore it is sufficient if the testator acknowledge to the witnesses, either separately or all together, that the will or the handwriting is his. *Stonehouse v. Evelyn*, 3 *P. Wms.* 254. *Grayson v. Atkinson*, 2 *Ves. sen.* 454. *Ellis v. Smith*, 1 *Ves.* 11. *Johnson v. Johnson*, 1 *C. and M.* 140. And it is sufficient though the witnesses do not know the paper to be the testator's will; *White v. Trustees of British Museum*, 6 *Bingh.* 310; *Wright v. Wright*, 7 *Bingh.* 457. If the witnesses set their marks to the will it is a sufficient attestation; *Harrison v. Harrison*, 8 *Ves.* 185; and they may attest it at several times; *Cook v. Parson*, *Prec. in Chanc.* 185; but in that case one witness alone will not be able to prove the due execution of the will. The witnesses need not attest every page, or know the contents, but all the will should be in the room at the time of attestation; whether it was so or not is a question for the jury. *Bond v. Seawell*, 3 *Burr.* 1773, 1 *Wm. Bl.* 407, *S. C.* *Lea v. Libb*, 3 *Mod.* 262. By the statute of frauds the witnesses must attest and subscribe the will in the presence of the testator; but it is sufficient if the testator was in such a position that he *might* see the witnesses attest, as where he was in one room and the witnesses in another, where he might have seen them through a broken window. *Shires v. Glasscock*, 2 *Salk.* 688. So where the testator was in bed, and the witnesses retired through a small passage into another room, and attested the will on a table opposite to the door, which was open, as well as the door of the testator's room. *Davy v. Smith*, 3 *Salk.* 395. *Todd v. Ld. Winchelsea*, *M. and M.* 12, 2 *C. and P.* 488, *S. C.* So where the testatrix sate in her carriage opposite the window of the attorney's office in which the will was attested. *Casson v. Dade*, 1 *Br. C. C.* 99. But where the will was attested in an adjoining room, and the jury found that in one part of the room in which the testator was, a person inclining forward, with his head out of the door, might have seen the witness, but that the testator was not in such a

situation in the room that he might, by inclining forward, have seen them, the execution was held invalid. *Doe v. Manifold*, 1 *Mau. and S.* 294.

Proof where the witnesses are dead, or deny their attestation.] Where the witnesses are dead, their handwriting, and that of the testator, should be proved, and though the attestation does not express that the witnesses subscribed the will in the presence of the testator, yet a jury may presume that fact in favour of the will. *Croft v. Pawlet*, 2 *Str.* 1109. *Brice v. Smith, Willes*, 1. *Hands v. James, Com.* 531. Even though all the witnesses to a will should swear that the will was not duly executed, evidence may be adduced in support of the will. *Lowe v. Jolliffe*, 1 *W. Bl.* 365. Where two of the witnesses are dead, and the surviving witness charges them with fraud in the attestation of the will, evidence of their good character is admissible. *Doe v. Walker*, 4 *Esp.* 50; *see Bishop of Durham v. Beaumont*, 1 *Campb.* 207; *Provis v. Reed*, 5 *Bingh.* 435.

Proof of wills thirty years old.] In a court of law, a will thirty years old, if the possession has gone under it, and sometimes without the possession, but always with the possession, if the signing is sufficiently recorded, proves itself; but, if the signing is not sufficiently recorded, it is a question whether the age proves its validity, and then possession under the will, and claiming and dealing with the property as if it had passed under the will, is cogent evidence to prove the duly signing, though it should not be recorded. *Per Lord Eldon, Lord Rancliffe v. Parsons*, 6 *Dow*, 202; *and see Doe v. Lloyd, Peake, Ev. App.* 91. 2 *C. and P.* 440. The thirty years should be computed from the date of the will, and not from the death of the testator. *M'Kenire v. Fraser*, 9 *Ves.* 5. *Calthorpe v. Gough, cited* 4 *T. R.* 707. 3 *Stark. Ev.* 1694. 1*st ed.* *Doe v. Wolley*, 8 *B. and C.* 22.

Witnesses.] By stat. 25 Geo. 2, c. 6, s. 1, if any person shall attest the execution of any will or codicil, to whom any beneficial devise, legacy, estate, interest, gift, or appointment of, or affecting any real or personal estate, other than and except charges on lands, tenements, or hereditaments, for payment of debts, shall be thereby given or made, such devise, &c. shall, so far only as concerns such person attesting the execution of such will or codicil, or any other person claiming under him, be null and void, and such person shall be admitted a witness to the execution of such will or codicil. It has been held by the present Master of the Rolls, *Emanuel v. Constable*, 3 *Russell*, 436, and by Sir John Nicholl, *Brett v. Brett*, 3 *Addams*, 210, *affirmed by the Delegates*, that this clause does not extend to wills of personal estate only; and that a legacy

to a person who is attesting witness to such a will is not void. A contrary doctrine was held by Sir W. Grant, *Lees v. Summersgill*, 17 *Ves.* 508. By sec. 2, if a creditor of the devisor, whose will is charged with the payment of the debt, attests the will, he shall be admitted as a witness. Where the attesting witness is the husband of a devisee who takes an estate in fee in remainder under the will, he is not made competent by the statute. *Hatfield v. Thorp*, 5 *B. and A.* 589. The statute avoids a devise to an attesting witness though there are three other attesting witnesses. *Doe v. Mills*, 1 *Moo. and Rob.* 288.

Proof of Execution of Powers.

All the circumstances required by the creators of a power, however unessential and otherwise unimportant they be, must be observed, and cannot be satisfied but by a strict and literal performance. *Per Lord Ellenborough, Hawkins v. Kemp*, 3 *East*, 440. Thus, where the power was to be executed, "by any deed or writing under the *hands* and seals of the parties, to be by them duly executed in the presence of, and *attested* by two or more witnesses," it was held, that as the attestation stated only a sealing and delivery, and omitted the *signing*, the power was not duly executed; *Doe v. Peach*, 2 *Mau. and S.* 576; and a subsequent correct attestation indorsed upon the instrument, after the death of one of the parties, will not remedy the defect. *Ibid. Wright v. Wakeford*, 4 *Taunt.* 214. So if the power is to be executed by an appointment, to be signed and *published* in the presence of, and attested by two witnesses, and the attestation omits to mention the publication. *Moodie v. Reid*, 7 *Taunt.* 355; *and see Wright v. Barlow*, 3 *Mau. and S.* 512, *M'Queen v. Farquhar*, 11 *Ves.* 467. A power required to be executed by a will *signed* and published in the presence of and attested by two witnesses, is not well executed where the party produces the will already signed, to the witnesses, separately, and acknowledges his handwriting. *Simeon v. Simeon*, 4 *Simons*, 555. But where a power was given to M. S. to be exercised "by will duly executed and *published* under her hand and seal in the presence of, and attested by, three or more credible witnesses," and M. S. signed, sealed, and delivered as and for her last will and testament, an instrument which was concluded and was attested as follows:—"In witness whereof I have set my hand and seal hereto in the presence of the underwritten—M. S." "Signed, sealed, and delivered this 5th day, &c. as the last will and testament of the said testatrix, M. S., who in her presence, and the presence of each other, have put our names as witnesses thereof—H. F., J. G., R. F.," it was held a sufficient execution of the power. *Ward v. Swift*, 1 *C. and M.* 171, 3 *Tyr.* 122, *S. C.* Where the attestation is defective, it cannot be

supplied by evidence that the witness did, in fact, see the party sign, &c. as well as seal. *Doe v. Peach*, 2 *Maule and S.* 576. The defect of omitting to state in the attestation the signing of the instrument is cured by stat. 54 Geo. 3, c. 168, with regard to powers theretofore executed, but the act is only retrospective. As to the execution of a power under a statute, *see R. v. Anstrey, ante, p.* 95.

Proof of Awards.

In proving an award, it is necessary to give evidence both of the submission to arbitration, and of the execution of the award; for without proof of the submission by all the parties, it would not appear that the arbitrator had competent authority to decide the whole question between the parties. *Antram v. Chase*, 15 *East*, 209; *Ferrer v. Oven*, 7 *B. and C.* 427; *and see Brazier v. Jones*, 8 *B. and C.* 124. If the submission was to two arbitrators named in the reference, and to a third person to be appointed by them, the appointment of such third person to be arbitrator must be duly proved. A recital of such appointment in the award, signed by the three, will not be sufficient; nor will it be enough to show that the third person acted with the other arbitrators, and signed the award. *Still v. Halford*, 4 *Campb.* 19. As to proof of an award under an inclosure act, *see R. v. Haslingfield*, 2 *Maule and S.* 558.

Proof by Witnesses.

Attendance of Witnesses.

The process to compel the attendance of witnesses is the writ of *subpœna ad testificandum*. Either the writ, or a ticket containing its substance, *Goodwin v. West, Cro. Car.* 522, 540, must be personally served on the witness, within a reasonable time before the trial. Notice to a witness in London, at two in the afternoon, requiring him to attend the sittings at Westminster in the course of the same evening is too short. *Hammond v. Stewart*, 1 *Str.* 510. If the cause be made a *remanet*, the *subpœna* must be re-sealed and re-served. *Tidd*, 855. The witness in a civil suit is not bound to attend, unless the reasonable expenses of going to and returning from the place of trial, and of his stay there, are tendered to him at the time of serving the *subpœna*; nor, if he appears, is he bound to give evidence before such expenses are paid or tendered. *Chapman v. Pointon*, 13 *East*, 16 (*n*). *Holme v. Smith*, 1 *Marsh.* 410. If the witness is in custody his attendance must be procured by a writ of *habeas corpus ad testificandum*. *Tidd*, 858. By stat. 44 Geo. 3, c. 102, a judge of the superior courts, and any justice of great sessions in Wales, and in the County Palatine

of Chester, may award a writ of *habeas corpus* to bring up a prisoner from any gaol or prison in the United Kingdom, for the purpose of giving evidence in any court of record in England.

During the time consumed by a witness in going to the place of trial, in his attendance there, and in his return, he is protected from arrest; 2 *Roll. Ab.* 272; *Randall v. Gurney*, 3 *B. and A.* 252, *Tidd*, 198; though he has attended, upon application, without a *subpœna*. *Per Lord Kenyon, Arding v. Flower*, 8 *T. R.* 536.

In some cases an application may be made to put off the trial on account of the absence of a material witness. An application to put off a trial beyond the existing sittings, or from sittings to sittings, is not allowed on the part of the plaintiff; for he may any time withdraw the record, if he is not prepared to try the cause. But where, from the sudden indisposition of a witness, who may be able to attend in the course of a day or two, or for any other temporary reason, the plaintiff is prevented from trying his cause in its order in the paper, yet has ground to believe he shall be able to try it before the sittings are over, it would be too much to make him withdraw his record, and a judge at *nisi prius* will therefore make an order for the trial to stand over till the witness is likely to attend. *Per Lord Ellenborough, Ansley v. Birch*, 3 *Campb.* 333. But in the Common Pleas, the trial can never be put off on the consent of the parties and counsel at the sittings at *nisi prius*, but the plaintiff must either proceed to try or withdraw the record. *R. M.* 50 *Geo.* 3, 2 *Taunt.* 221. And in general a judge at *nisi prius* will not put off the trial on the ground of the absence of a material witness, at the instance of the plaintiff, as he may withdraw the record. *Maspero v. Strachan*, 5 *C. and P.* 514. Where a motion is about to be made to a judge at *nisi prius*, for putting off the trial on account of the absence of a witness, notice should first be given to the plaintiff's attorney, with a copy of the intended affidavit. 1 *Phill. Ev.* 16. Where expense has been incurred by the other party in bringing up witnesses, the application will only be granted on the terms of those expenses being paid. No affidavit of merits is required. *Att. Gen. v. Hull*, 2 *Dowl. P. C.* 111. The affidavit may be made by the defendant, or by his attorney. *Duberley v. Gunning, Peake*, 97. *See the form, Appendix.*

Jurors.

A juror may be sworn and examined as a witness, and yet remain on the jury. *Fitzjames v. Moys*, 1 *Sid.* 133.

Incompetency from want of Understanding.

Insane persons, idiots, and lunatics, during their lunacy, are incompetent witnesses. But lunatics, in their lucid inter-

vals, when they have recovered their understandings, are competent. *Com. Dig. Testm.* (*A.* 1.) A person born deaf and dumb may, if he has sufficient understanding, give evidence by signs through an interpreter; *Ruston's case,* 1 *Leach,* C. C. 455, *3rd edition;* or if he can write, *that* is the more certain mode. *Per Best, C. J., Morriso v. Lennard,* 3 *C. and P.* 127. Children not able to comprehend the moral obligation of an oath cannot be examined; *Com. Dig. ubi sup. B. N. P.* 293; but children of any age may be examined on oath, if capable of distinguishing between good and evil. *Brazier's case,* 1 *East, P. C.* 443. Where the child cannot be sworn, the account which it has given of the transaction to others is inadmissible. *R. v. Tucker,* 1 *Phill. Ev.* 19.

Incompetency from want of Religious Principle.

Atheists, and such infidels as profess no religion that can bind their consciences to speak the truth, are excluded from being witnesses. *B. N. P.* 292. *Omichund v. Barker, Willes,* 549. But infidels, as Gentoos, who believe in a God, the avenger of falsehood, are received as witnesses. *Omichund v. Barker, Willes,* 549. All persons ought to be sworn according to the ceremonies of their religion. *Id.* 547. *Atcheson v. Everitt, Coup.* 390. Jews on the Pentateuch; *Id.* Mahometans on the Koran. *Morgan's case,* 1 *Leach, C. C.* 64. So a witness who declines swearing on the New Testament, though he professes Christianity, may be allowed to swear on the Old Testament, if he considers that mode binding on his conscience. *Edmonds v. Rowe, R. and M.* 77. The proper time for asking the witness whether the form of administering the oath is binding on his conscience is previous to its administration. But, if the oath is administered in the legal form, before the attention of the court or the counsel is directed to it, the question may be properly asked afterwards. If the witness should reply, that he considers the oath taken to be binding on his conscience, it would be irrelevant to ask further whether there be any other mode of swearing more binding than that used. *The Queen's case,* 2 *B. and B.* 284. *See Sells v. Hoare,* 7 *B. Moore,* 36.

The proper mode of examining a witness for the purpose of trying his competency in religious principle, is not to question him as to his particular opinions (as to whether he believes in Jesus Christ), but whether he believes in God, the obligation of an oath, and a future state of rewards and punishments; *Per Buller, J., R. v. Taylor, Peake,* 11; 1 *Phill. Ev.* 24; and it seems sufficient if he states that he believes in a God who will reward or punish him in *this* world. *Omichund v. Barker, Willes,* 550.

The solemn affirmation of a quaker had the same effect as an oath in civil cases by *stat.* 7 *and* 8 *W.* 3, *c.* 34; and now,

by statutes 59 Geo. 4, c. 15, and 3 and 4 W. 4, c. 49, an affirmation has the same effect as an oath in all cases civil and criminal, and for all other purposes.

Incompetency from Infamy.

Persons convicted of treason, felony, or any species of the *crimen falsi*, as forgery, perjury, subornation of perjury, &c., are incompetent to be witnesses. *Com. Dig. Testm.* (*A.* 3-4). *Co. Litt.* 6 *b.* So a conviction for bribing a witness to absent himself; *Clancey's case*, *Fort.* 209; barratry; *R. v. Ford*, 2 *Salk.* 690; and conspiracy at the suit of the king, that is, a conspiracy to accuse another of a capital offence, will render a witness incompetent. *Co. Litt.* 6 *b.* But a conviction for conspiring to raise the funds by false rumours, does not, as it seems, render the party incompetent; *Crowther v. Hopwood*, 3 *Stark.* 21; 2 *Dods.* 174; but in *Bushell v. Barrett*, *R. and M.* 434, it was held by Gaselee, J., after consulting with Littledale, J., that a judgment for a conspiracy to bribe a person (summoned as a witness on an information on the revenue laws) not to appear, renders the person convicted incompetent as a witness. A conviction for keeping a gambling-house does not disqualify; *R. v. Grant*, *R. and M.* 270; but a person convicted of winning by fraud or ill practice at certain games, seems rendered incompetent by stat. 9 Anne, c. 14, s. 6, which enacts that he shall be deemed infamous. Outlawry in a personal action does not render the party incompetent. *Co. Litt.* 6 *b.* But it is otherwise of outlawry for treason or felony. 3 *Inst.* 212. It is not the punishment, but the conviction for the offence, which causes the infamy. *B. N. P.* 292. *R. v. Ford*, 2 *Salk.* 690. The competency of infamous witnesses is restored in certain cases by statute. *Vide infra.*

Proof of judgment.] In order to establish the incompetency of the witness on the ground of infamy, the judgment must be proved in the usual way. *R. v. Castell Careinion*, 8 *East*, 78, *supra.* An admission by the witness himself, that he is confined under such judgment, is not sufficient to render him incompetent, however it may affect his credit. *Ibid.*

Competency of infamous witnesses, how restored.] The competency of a person who has been rendered an incompetent witness by a conviction is restored by pardon. *Com. Dig. Testm.* (*A.* 3-4.) And by statute 7 and 8 Geo. 4, c. 28, s. 13, where the king's majesty shall be pleased to extend his royal mercy to any offender convicted of any felony, punishable with death or otherwise, and by warrant under his royal sign manual, countersigned by one of his principal secretaries of state, shall grant to such offender either a free or a conditional pardon; the discharge of such offender out of custody, in the case of a

free pardon, and the performance of the condition, in case of a conditional pardon, shall have the effect of a pardon under the great seal for such offender, as to the felony for which such pardon shall be so granted. And by statute 9 Geo. 4, c. 32, s. 3, where any offender hath been or shall be convicted of any felony not punishable with death, and hath endured or shall endure the punishment to which such offender hath been or shall be adjudged for the same, the punishment so endured hath and shall have the like effects and consequences as a pardon under the great seal, as to the felony whereof the offender was so convicted. By section 4 (reciting that there are certain misdemeanors which render the parties convicted thereof incompetent witnesses), where any offender hath been or shall be convicted of any such misdemeanor, (except perjury or subornation of perjury), and hath endured or shall endure the punishment to which such offender hath been or shall be adjudged for the same, every such offender shall not, after the punishment so endured, be deemed to be, by reason of such misdemeanor, an incompetent witness in any court or proceeding, civil or criminal. Where the pardon is conditional, the performance of the condition must be proved. *Hawk. P. C. b. 2, c. 37, s.* 45. But where a man has been sentenced to transportation, and confined in the hulks for the term, and discharged at the end of it, it will not destroy the effect of the pardon that he has escaped twice, for a few hours each time. *R. v. Badcock, Russ. and Ry. C. C.* 248. Where the incompetency is by statute made part of the punishment, as in a conviction for perjury or subornation of perjury, under the statute 5 Eliz. c. 9, the king's pardon will not restore the competency of the offender. *B. N. P.* 292. *But see* 2 *Harg. Jurid. Arg.* 221.

Incompetency from Interest.

Objection, when taken.] Regularly, the objection to the competency of a witness ought to be taken on the *voir dire*, though if his incompetency is discovered at any time during the trial, his evidence will be struck out. *Turner v. Pearte*, 1 *T. R.* 720. However, it has been said, that a party who is cognizant of the interest of the witness at the time when he is called, is bound to make his objection in the first instance. *Ibid.* 2 *Stark. Ev.* 757. And after the witness has left the box, there is an end of all questions as to his competency. *Beeching v. Gower, Holt*, 314. So where interrogatories and cross interrogatories were read at a trial, and from the answers it appeared that the witness was interested, Gibbs, C. J., received the evidence, ruling that the objection ought to have been made in a former stage. *Ogle v. Paleski, Holt*, 485. The party objecting may examine the witness on the *voir dire*, and also, if necessary, call another witness to prove the incom-

petency; if the objection is raised by independent evidence, and without putting a question to the witness, the party who called him cannot be allowed to put a question to him in order to repel the objection. 1 *Phill. Ev.* 123.

Where the witness himself is examined on the *voir dire*, he may be asked as to the contents of a written instrument without a notice to produce; though if the witness produces the instrument on which the objection is founded, it ought to be read. *Butler v. Carver*, 2 *Stark.* 434. The objection of interest may be removed in the same manner as it was raised, and therefore, where the witness was objected to as next of kin, in an action by an administrator, but on re-examination answered, that he had released his interest, the objection was held to be properly removed. *Ingram v. Dade*, 1 *Phill. Ev.* 124. *Botham v. Swingler*, 1 *Esp.* 164, *Peake*, 218, *S. C.* But if the objection is not raised out of the mouth of the witness, it must be answered by facts proved in the ordinary way. 1 *Esp.* 164. Therefore in an action by assignees of a bankrupt where the bankrupt is called, and it appears by the pleadings that he is the bankrupt, and so interested, his competency must be restored by proving his certificate and release. *Goodhay v. Hendry*, *M. and M.* 319. *Anon. cor. Tindal*, *Id.* 321. Yet where a bankrupt called as a witness, stated on the *voir dire* that he had obtained his certificate and released his assignees, Parke, J., held him competent without the production of the release. *Carlisle v. Eady*, 1 *C. and P.* 284. Where the objection is removed by independent evidence, and not on the *voir dire*, such evidence is governed by the ordinary rules. *Corking v. Jarrard*, 1 *Campb.* 37.

Time of acquiring the interest and amount.] A witness cannot, by making a wager on the point in question, render himself incompetent, and thus deprive the party of his testimony. *Barlow v. Vowell*, *Skinn.* 586. And it has been laid down as a general principle, that where a person makes himself a party in interest, after a plaintiff or defendant has an interest in his testimony, he cannot by this deprive the plaintiff or defendant of his testimony. *Per Grose, J.*, *Bent v. Baker*, 3 *T. R.* 27. But it has been since held, that though the witness would not be disqualified by an agreement *fraudulently* entered into between him and a party for the purpose of taking off his testimony; yet, on the other hand, the pendency of a suit could not prevent third persons from transacting business *bonâ fide* with one of the parties; and if an interest in the event of the suit is thereby acquired, the general consequence of law must follow, that the party so interested cannot be examined as a witness for that party, from whose success he will necessarily derive an advantage. *Forrester v. Pigou*, 3 *Campb.* 380. 1 *Mau. and S.* 9. Where, subsequently to the execution of the in-

strument, the witness becomes interested by operation of law, as by becoming executor or administrator, or by marriage, the general rule is that evidence of his handwriting is admissible. *Vide ante, p.* 84.

However small the amount of interest may be, the witness will be incompetent. *Burton v. Hinde,* 5 *T. R.* 174. *Doe v. Tooth,* 3 *Y. and J.* 19, *vide infra.*

What is such an interest as excludes.] The general rule is, that no objection can be made to the competency of a witness, unless he is directly interested in the event of the suit, or can avail himself of the verdict in the cause so as to give it in evidence on any future occasion in support of his own interest. *Per Ld. Kenyon, Smith v. Prager,* 7 *T. R.* 62. *Doddington v. Hudson,* 1 *Bingh.* 260. *Radburn v. Morris,* 4 *Bingh.* 649.

The admission of interested witnesses in general is now provided for by the statute 3 and 4 W. 4, c. 42, s. 26, (*post p.* 104,) but as there are many cases to which that statute does not apply, it is necessary to state the authorities with regard to the exclusion of evidence on the ground of interest.

There are various instances in which a witness is excluded, on the ground of his being directly interested in the event of the suit. Thus a residuary legatee is incompetent in an action brought by the executor to recover a debt due to the testator. *Baker v. Tyrwhitt,* 4 *Campb.* 27. So in ejectment, where the plaintiff has made out a *primâ facie* case, a witness, who states that he is himself the real tenant, is incompetent for the defendant, since he would be turned out under a judgment for the plaintiff. *Doe v. Wilde,* 5 *Taunt.* 183, *and see* 6 *Bingh.* 394. So a witness who has a power of attorney from the plaintiff to receive the sum recovered, and intends to pay himself thereout a debt due from the plaintiff. *Powel v. Gordon,* 2 *Esp.* 735.

Wherever a verdict for the plaintiff would be evidence for the witness in a subsequent action by him, he is incompetent to support the plaintiff's case. Thus, if he claims a customary right of common, he is incompetent to support the case of another person claiming under the same custom, for the verdict would be evidence for himself. *Per Buller, J., Walton v. Shelley,* 1 *T. R.* 302. *Ld. Falmouth v. George,* 5 *Bingh.* 286; *and see Le Fleming v. Simpson,* 2 *M. and R.* 169. But it is otherwise where the right of common is claimed by prescription, as belonging to the estate of another person. *Ibid. Harvey v. Collison,* 2 *Selw. N. P.* 1118. So if the plaintiff has agreed with the witness, that in case he recovers the lands, the witness shall have a lease of them for so many years, the witness is incompetent; *Gilb. Ev.* 122; for in case the witness sued on such agreement, the judgment obtained on his own evidence,

would form part of his proofs. So a witness is incompetent who is to repay a sum of money to the plaintiff if he fails, but to retain it if he succeeds. *Fotheringham v. Greenwood*, 1 *Str.* 129; *and see Forrester v. Pigou*, 1 *Mau. and S.* 9.

In an action on the case for negligently driving a coach against the plaintiff's waggon-horse, whereby it died, it was held that the plaintiff's waggoner was incompetent to prove the negligence of the defendant, without a release from his master. *Morish v. Foote*, 8 *Taunt.* 455. *Rotheroe v. Elton*, *Peake*, 117, 3*d ed.* *Sherman v. Barnes*, 1 *Moo. and Rob.* 69. *Wake v. Locke*, 5 *C. and P.* 454.

Wherever a verdict for the plaintiff would be evidence against the witness in a subsequent action, he is incompetent to support the defendant's case. Thus in an action against a master, for the negligence of his servant, the servant is incompetent to disprove the negligence, since the verdict would be evidence of the amount of damages in an action by the master against the servant; *Green v. New River Company*, 4 *T. R.* 589; and so of an agent in an action against his principal, for negligence. *Gevers v. Mainwaring*, *Holt*, 139. *Hawkins v. Finlayson*, 3 *C. and P.* 305. So the broker, who made the distress, is an incompetent witness for the defendant in an action for an excessive distress. *Field v. Mitchell*, 6 *Esp.* 73. So in trover against a sheriff, the officer who made the levy is not a competent witness for the defendant, though he is indemnified by the execution creditor. *Whitehouse v. Atkinson*, 3 *C. and P.* 344. But in an action against a sheriff for negligently executing a writ, an assistant of the sheriff's officer, by him employed to execute the writ, was held to be a competent witness for the sheriff, without a release from the officer, on the ground that the verdict could not be used against the witness, since he was not employed by the defendant. *Clark v. Lucas*, *R. and M.* 32. In an action against the sheriff, for an improper return to a *fi. fa.* stating a payment of a sum of money to the landlord for arrears of rent, the landlord is not competent to prove the rent due, for, if the action succeeded, the witness would be liable to the sheriff, and this judgment would be evidence of special damage. *Keightley v. Birch*, 3 *Campb.* 521. If the judgment could be used in a subsequent action against the witness, to establish the amount of costs, the whole, or a portion of which, the witness would be bound to pay, he is an incompetent witness. Thus bail cannot give evidence for their principal; *Carter v. Pearce*, 1 *T. R.* 164; *Hawkins v. Inwood*, 4 *C. and P.* 148; nor the wife of the bail; *Cornish v. Pugh*, 8 *D. and R.* 65; nor a person who has paid money into the hands of the sheriff on behalf of the defendant in lieu of bail. *Lacon v. Higgins*, *D. and R. N. P. C.* 436, *Stark.* 184, *S. C.* To make the bail a witness, the party may apply to the court to have his name struck off, on justifying other bail.

Tidd, 264; *and see Baillie v. Hole, M. and M.* 289, *post p.* 116. On the same ground, where an infant sues, his *prochein amy* or guardian is not a competent witness for him. *James v. Hatfeild*, 1 *Str.* 548. *Gilb. Ev.* 107; *see also Goodacre v. Breame, Peake*, 174; *and the case of Jones v. Brooke*, 4 *Taunt.* 464, *cited post in Assumpsit on Bills of Exchange.* If the judgment for the plaintiff would have the effect of turning the witness out of possession, he is not a competent witness for the defendant. *Doe v. Wilde*, 5 *Taunt.* 183, 1 *Marsh.* 7, *S. C. Doe v. Bingham*, 4 *B. and A.* 672. In cases of public rights, affecting all the king's subjects, there is an exception *ex necessitate* to the general rule, that witnesses against whom the verdict would be evidence are excluded. Thus it has been held by all the judges that in an action for toll traverse, claimed on a public road, persons who have refused to pay the toll are of necessity competent to give evidence for the defendant. *Lancum v. Lovell*, 9 *Bingh.* 465.

It is a general rule that a bankrupt is incompetent to prove any fact in support of his commission, though he has obtained his certificate, and released his surplus allowance. *Field v. Curtis*, 2 *Str.* 829. *Chapman v. Gardner*, 2 *H. Bl.* 279. But a bankrupt who has obtained his certificate, and released the surplus of his estate, is competent to prove the handwriting of the commissioners, in order to identify the proceedings taken under the commission against him; for the validity of the commission does not depend upon that signature, but upon the facts contained in the deposition to which the signature is subscribed. *Morgan v. Pryor*, 2 *B. and C.* 14. The declarations of a bankrupt also, at the time of his absenting himself, are evidence to establish an act of bankruptcy, by showing with what intention he absented himself. *Rawson v. Haigh*, 2 *Bingh.* 99, 9 *B. Moore*, 217, *S. C.*; *and see ante*, "*Hearsay*," *and post* "*Actions by Assignees of Bankrupts.*" An insolvent is not a competent witness for the plaintiffs, in an action by his assignees, for his future property is liable; *Delafield v. Freeman*, 4 *C. and P.* 67; and the creditor of an insolvent who has assigned his effects to trustees, is not a competent witness for the defendant, the insolvent, in an action defended by the trustees, it being doubtful whether the estate will pay 20s. in the pound. *Crerer v. Sodo*, 3 *C. and P.* 10.

What is such an interest as excludes—statute 3 *and* 4 *W.* 4, *c.* 42.] By statute 3 and 4 W. 4, c. 42, s. 26, in order to render the rejection of witnesses on the ground of interest less frequent, it is enacted, that if any witness shall be objected to as incompetent on the ground that the verdict or judgment in the action on which it shall be proposed to examine him, would be admissible in evidence for or against him, such witness shall nevertheless be examined, but in that case a verdict or judg-

ment in that action, in favour of the party in whose behalf he shall have been examined, shall not be admissible in evidence for him or any one claiming under him, nor shall a verdict or judgment against the party, on whose behalf he shall have been examined, be admissible in evidence against him or any one claiming under him.

And by section 27 the name of every witness objected to as incompetent on the ground that such verdict or judgment would be admissible in evidence for or against him shall at the trial be indorsed on the record or document on which the trial shall be had, together with the name of the party on whose behalf he was examined, by some officer of the court, at the request of either party, and shall be afterwards entered on the record of the judgment; and such indorsement or entry shall be sufficient evidence that such witness was examined in any subsequent proceeding in which the verdict or judgment shall be offered in evidence.

In an action for negligence, it was held by Patteson, J., that the servant of the defendant, by whom the negligence was actually committed, was not made a competent witness by the above statute. *Mitchell v. Hunt,* 6 *C. and P.* 351. And in an action by the indorsee against the acceptor of a bill, accepted for the accommodation of the drawer, Lord Lyndhurst, C. B., ruled that the drawer was not made competent. *Burgess v. Cultill,* 6 *C. and P.* 282.

What is not such an interest as excludes.] The circumstance of the witness standing in the same situation as the party by whom he is called is not sufficient to exclude his evidence. Thus in case of two actions brought against two persons for the same assault, in the action against one the other may be a witness. *Per Ashurst, J., Walton v. Shelley,* 1 *T. R.* 301. So in an action against an underwriter, another underwriter on the same policy is a good witness for the defendant. *Bent v. Baker,* 3 *T. R.* 27. A witness who believes himself interested, but is not so in fact, is competent; thus a witness who believes himself under an obligation of honour to indemnify the bail, but who has entered into no engagement to indemnify, is competent. *Pederson v. Stoffles,* 1 *Campb.* 145. There are, however, authorities that a witness who believes himself *legally* interested is incompetent. *See Trelawney v. Thomas,* 1 *H. Bl.* 307, *and the cases cited* 1 *Phill. Ev.* 52 (*n*). 2 *Stark. Ev.* 747 (*n*), 1*st ed.* Unless the verdict would be evidence for or against the witness, in a subsequent action, it is no objection to his competency that the jury might hear of and be biassed by it. *R. v. Bray. Rep. temp. Hard.* 358. The borrower of money for a usurious consideration is a competent witness for the plaintiff, in an action for penalties against the lender. *Abrahams v. Bunn,* 4 *Burr.* 2251. In trover by A.

against B., C. is a competent witness to prove property in himself. *Ward v. Wilkinson*, 4 *B. and A.* 410.

Where a witness is equally interested on both sides he is a competent witness for either. Thus in an action for money had and received, a witness may prove the money paid by the defendant to him, as agent for the plaintiff, since he is liable to one or the other of the parties. *Ilderton v. Atkinson*, 7 *T. R.* 480. *See Fancourt v. Bull*, 1 *Bingh. N. C.* 681. But a person who has received money due from a defendant to a plaintiff is not a competent witness for the defendant, to prove that he received the money as agent for the plaintiff, or in his own right, if his conduct has been such that he would be liable, in the event of a verdict against him, to pay the defendant not only the money received, but the costs of that action, in which the plaintiff should recover. *Per Littledale, J., Larbalestier v. Clark*, 1 *B. and Ad.* 902. The payee of an accommodation note is competent to prove that he indorsed it to the plaintiff before it became due in payment for goods; for though he would be liable to the plaintiff for goods sold, if the action failed, yet, if it succeeded, he would be liable to the defendant for money paid. *Shuttleworth v. Stephens*, 1 *Campb.* 408. *See also Banks v. Kain*, 2 *C. and P.* 597.

The circumstance that the witness would be exposed to an action, in case the fact in question is found against his testimony, is not sufficient to render him incompetent. Thus, a person who has filled a corporate office may be called to show the usage of the office, though if his acts be illegal, he would be liable to a *quo warranto*. *R. v. Bray, Rep. temp. Hardw.* 358. 2 *Selw. N. P.* 1087, 4*th ed.* The bare possibility of an action being brought against a witness is no objection to his competency, and therefore, in an action against an administrator, one of the bond securities, for the defendant's due administration of the intestate's effects, is a competent witness, on behalf of the defendant, to prove a tender. *Carter v. Pearce*, 1 *T. R.* 163; *but see Morish v. Foote*, 8 *Taunt.* 455, *ante p.* 103.

Trustees and executors in trust, not taking a beneficial interest, are competent witnesses for their *cestui que trust, &c.* *Gilb. Ev.* 120. *Lowe v. Joliffe*, 1 *W. Bl.* 366. *Goodtitle v. Welford, Doug.* 140. And a creditor who has assigned his debt, though only by parol, is a competent witness to increase the fund out of which the debt is to be paid. *Heath v. Hall*, 4 *Taunt.* 326.

Agents are competent witnesses for their principals, for the sake of trade and the common usage of business. *B. N. P.* 289. Thus a factor may prove a sale, though he is to receive the extra amount beyond a stated sum. *Benjamin v. Porteus*, 2 *H. Bl.* 590. So servants and carriers are competent, without a release, to prove the payment or receipt of money, or the delivery of goods. *Green v. New River Company*, 4 *T. R.* 590.

Spencer v. Goulding, Peake, 129. An apprentice also is a competent witness to prove that he has paid money by mistake. *Martin v. Horrell,* 1 *Str.* 647. And in an action against a carrier for not delivering a parcel, his servant is competent to prove the delivery. *Ross v. Rowe,* 3 *Ford's MSS.* 98, *cited* 2 *Stark. Ev.* 754, 1*st ed.* And a broker who effects a policy, and has a lien upon it for his premiums, is competent to prove all matters connected with the policy. *Hunter v. Leathley,* 10 *B. and C.* 858. But if a person enters into a contract for the purchase of goods in his own name, he is not a competent witness in an action for goods sold and delivered, to prove that he purchased them as agent for the defendant. *M'Brain v. Fortune,* 3 *Camph.* 317. The rule, that agents are competent witnesses, does not extend to acts which are tortious, and out of the ordinary course of their employment; thus in an action against a master for the negligence of his servant, the latter is incompetent to disprove the negligence. *Green v. New River Company,* 4 *T. R.* 589, *ante p.* 103. It has been held that the rule, as to admitting the evidence of agents, does not extend to a person who is only employed as an agent in the particular transaction in question. *Edmonds* v. *Lowe,* 8 *B. and C.* 408, *post.*

Though, in general, informers entitled to part of the penalty are not competent witnesses, yet, where a statute can receive no execution unless a party interested be a witness, he must then be admitted. *Gilb. Ev.* 128. Thus in an action under statute 2 Geo. 2, c. 24. s. 8, for penalties for bribery at elections, the informer is a competent witness. *Bush v. Ralling, Say.* 289. *Heward v. Shipley,* 4 *East,* 180. So by various statutes persons interested are made competent witnesses. Thus in an action against churchwardens or overseers, for money mis-spent by them, inhabitants of the parish who do not receive alms, or any gift out of the parochial collection, are rendered competent witnesses by statute 3 Wm. 3, c. 11, s. 12. So where penalties are given to the use of the poor, for the benefit and exoneration of the parish, or other place, the inhabitants are rendered competent witnesses by statute 27 Geo. 3, c. 29, provided the penalty does not exceed 20*l.* *R. v. Davis,* 6 *T. R.* 177. So in an action against the hundred by a party robbed, the inhabitants of the hundred may be witnesses by statute 8 Geo. 2, c. 16, s. 15, and the party robbed is competent to prove the robbery and the extent of his loss. *B. N. P.* 187. Again, in cases relative to the execution of the highway act, the surveyor of the parish is a competent witness, though part of his salary may arise from penalties imposed by the statute 13 Geo. 3, c. 78, s. 69. In actions on tolls, the collector is a competent witness. 3 Geo. 4, c. 126. s. 59.

So by the customs act, 6 Geo. 4, c. 108, s. 5, it is enacted, that if upon any trial, a question shall arise whether any

person is an officer of the army, navy, or marines, being duly authorised, and on full pay, or officer of customs or excise, evidence of his having acted as such shall be deemed sufficient, and such person shall not be required to produce his commission or deputation, unless sufficient proof shall be given to the contrary; and every such officer, and any person acting in his aid or assistance, shall be deemed a competent witness, upon the trial of any suit or information, on account of any seizure or penalty as aforesaid, notwithstanding such officer or other person may be entitled to the whole or any part of such seizure or penalty. By statute 54 Geo. 3, c. 170, s. 9, no inhabitant or person rated or liable to be rated to any rates or cesses of any district, parish, township, or hamlet, or wholly or in part maintained thereby, or executing or holding any office thereof or therein, shall be deemed, on such account, an incompetent witness for or against such district, parish, &c. in any matter (*Oxenden v. Palmer*, 2 *B. and Ad.* 236, *R. v. Bishop Auckland*, 1 *Moo. and Rob.* 286) relating to such rates or cesses, or relating to the boundary between such district, parish, &c. and any adjoining district, &c. or in any matter relating to any order of removal to or from such district, or to the settlement of any pauper in such district, or touching any bastards chargeable, &c., or touching the recovery of any sum for the charges or maintenance of such bastards, or the election or appointment of any officer, or the allowance of the accounts of any officer of any such district. Under this statute, a person who occupies rateable property within a chapelry, is a competent witness to prove that a certain messuage is situated within the chapelry. *Marsden v. Stansfeld*, 7 *B. and C.* 815. The statute renders inhabitants competent in an action by the surveyor of highways against his predecessor for penalties. *Heudebourck v. Langston*, *M. and M.* 402 (*n*). In an action against an overseer, defending on behalf of the parish, an inhabitant is not rendered competent for the overseer by the above statute. *Tothill v. Hooper*, 1 *Moo. and Rob.* 392.

Incompetency of Witness, as Party to a Suit.

A person who is a party on the record, though he be merely a trustee, *Bauerman v. Radenius*, 7 *T. R.* 663, is incompetent as a witness for himself, or a joint suitor; *Gilb. Ev.* 130; though in an action against the governors of the Foundling Hospital, for work done by the plaintiff for the use of the hospital, Lord Kenyon admitted several of the governors as witnesses for the defence. *Weller v. Governors of F. H.*, *Peake*, 153. So where the mayor and commonalty of London were plaintiffs, and the question was, whether the corporation were entitled to certain tolls, it was held, that freemen, members of the corporation, might be called in support of the claim, because the tolls were received for the benefit of the whole cor-

porate body; *R. v. the Mayor and Com. of London,* 2 *Lev.* 231; 1 *Vent.* 351; *Sutton Coldfield v. Wilson,* 1 *Vern.* 254; *Gilb. Ev.* 126; *Peake's Ev.* 174; but this decision has been very properly doubted. *B. N. P.* 290. *Burton v. Hinde,* 5 *T. R.* 174. And in a late case, it was held, that a corporator was not a competent witness in an action brought by the corporation, even though he had released his interest in the subject matter of the suit, since in case of a verdict against the plaintiffs, the corporate funds would be decreased by the amount of the costs. *Doe v. Tooth,* 3 *Y. and J.* 19. If the witness is substantially a party to the record he is incompetent, though not nominally a party on the record. Thus, in an action against one of several partners, the defendant cannot call one of his co-partners, and it is doubtful whether he can render him competent by a release. *Simons v. Smith, R. and M.* 112; *see post p.* 112. Where trustees for public purposes are empowered by statute to sue in the name of their treasurer, a trustee is not a competent witness for the plaintiff, in an action so brought. *Whitmore v. Wilks, M. and M.* 214. But where a local act empowered the directors and overseers of the poor of a parish, to sue and be sued in the name of their clerk, and they were not personally liable, it was held, in an action for goods supplied to the directors, that a person who was one of the directors when the goods were supplied, was a competent witness for the defendant. *Fletcher v. Greenwell,* 1 *Crom. M. and R.* 754.

There are some exceptions to this rule. Thus, in an action on the statute of Winton, 13 Ed. 1, c. 2, the plaintiff (the party robbed) may prove the robbery, and the amount of the loss; but he is not competent to prove any other facts in support of his case, as that the place where he was robbed is within the hundred. *B. N. P.* 187. *Per Page, J., R. v. Reading, Rep. temp. Hard.* 83. 2 *Roll. Ab.* 685. The party robbed is competent, though his servant was present. *Merrick v. Hundred of Ossulston, cited* 3 *Ford.* 15; 3 *Stark. Ev. Appendix to p.* 681, 1*st ed.* In an action also for a malicious prosecution, the evidence given by the defendant, on the indictment, is said to be admissible for him, on the trial of the action. *Cobb v. Carr, B. N. P.* 14; *and see Johnson v. Browning,* 6 *Mod.* 216.

A party to the suit cannot be compelled to give evidence for the opposite party. Thus, in an action of ejectment on the several demises of two lessors, one of the lessors is not compellable to give evidence for the defendant, though no title is proved in him; *Fenn v. Granger,* 3 *Campb.* 178; but one of several co-plaintiffs may be called for the defence; if he does not himself object. *Norden v. Williamson,* 1 *Taunt.* 378; *but see* 3 *Stark. Ev.* 1061. And where one of several defendants had suffered judgment by default, it was held that he might,

with his own consent, he called as a witness for the plaintiff. *Worrall v. Jones*, 7 *Bingh.* 395.

Co-defendant, when competent.] Where a person is *arbitrarily* made defendant to prevent his testimony, he may, if nothing is proved against him, be sworn as a witness for the other defendants; *B. N. P.* 285; but one of several defendants, against whom nothing is proved, is not, as a matter of right, entitled to a verdict at the close of the plaintiff's case, so as to make him a competent witness for his co-defendants. *Emmet v. Butler*, 7 *Taunt.* 607. It was ruled by Best, C. J., that a co-defendant against whom the plaintiff has given no evidence, had no right to an acquittal until all the other evidence for the defendants was finished. *Wright v. Paulin, R. and M.* 128; *and see Huxley v. Berg*, 1 *Stark.* 98. But Lord Tenterden held that the time of taking such an acquittal is in the discretion of the judge, and that it may be taken whenever it is most convenient. *Carpenter v. Jones, M. and M.* 198 (*n*). And now the general rule, as determined upon by all the judges, with regard to defendants not fixed by the evidence is, that the verdict in their favour is to be taken at the end of the plaintiff's case. *Russell v. Rider*, 6 *C. and P.* 416. *Child v. Chamberlain*, 6 *C. and P.* 213, 1 *Moo. and Rob.* 318, *S. C.* In assumpsit, where one defendant pleads a plea operating in his personal discharge, a verdict may be taken for him on that plea, and he may then be examined as a witness for his co-defendants. *Bate v. Russell, M. and M.* 332.

Co-defendant when competent—bankruptcy.] Where one of several defendants pleads his bankruptcy and certificate in bar, and a *nolle prosequi* is entered as to him, he is a competent witness for his co-defendants, for in case of a verdict for the plaintiff, the demand of the co-defendant against the witness would be barred by the certificate. *Moody v. King*, 2 *B. and C.* 558. And even where the defendants were partners in the transaction, it was held that the one who had pleaded his bankruptcy and certificate, and against whom a *nolle prosequi* was entered, was a good witness for his co-defendant, after releasing his surplus, since the co-defendant's demand in case of a verdict for the plaintiffs would be proveable under the witness's commission. *Aflalo v. Foudrinier*, 6 *Bingh.* 306, *M. and M.* 334 (*n*), *S. C.* But one of several co-defendants cannot be called as a witness, unless he has either been acquitted or a *nolle prosequi* has been entered as to him. *Raven v. Dunning*, 3 *Esp.* 25. *Emmet v. Butler*, 7 *Taunt.* 599.

Co-defendant when competent—suffering judgment by default, in action ex contractu]. Where one of several defendants suffers judgment by default in an action *on a contract*, he is

not competent, for the other defendants, to negative the contract, because, if the action should fail as to one, it would fail as to all the defendants; *Brown v. Fox*, 1 *Phill. Ev.* 78, *cited* 8 *Taunt.* 141; nor is he competent for the plaintiff, for should the plaintiff succeed, the witness would be entitled to contribution against his co-defendants. *Brown v. Brown*, 4 *Taunt.* 752; *see also Mant v. Mainwaring*, 8 *Taunt.* 139, 2 *B. Moore*, 13, *S. C.*

Co-defendant when competent—suffering judgment by default, in action ex delicto.] Where one of several defendants suffers judgment by default in an action of *tort*, he is a competent witness *for his co-defendants*; for though they should be acquitted, he would still remain liable, and he is not liable to the costs of the issue tried against the others. *Ward v. Haydon*, 2 *Esp.* 553. But where the jury were as well to try the issues as to assess the damages against him who had suffered judgment to go by default, Best, C. J., refused to receive the evidence of the latter for his co-defendants. *Mash v. Smith*, 1 *C. and P.* 577. A co-trespasser who has suffered judgment by default, is not a competent witness for the plaintiff against his co-defendants. *Chapman v. Graves*, 2 *Campb.* 333 (*n*). *Mant v. Mainwaring*, 2 *B. Moore*, 13, 8 *Taunt.* 139, *S. C.* In an action of ejectment, however, against two defendants, one of the defendants who had suffered judgment by default was held by Lord Ellenborough to be a competent witness for the plaintiff to prove the other defendant in possession, on the ground that the only supposed interest imputable to him was the possibility of the plaintiff suing the other defendant only, in an action for mesne profits, in case he recovered in the ejectment. *Doe v. Green*, 4 *Esp.* 198.

Co-trespasser and co-contractor, not sued, when competent.] In an action of trespass, a co-trespasser, not sued, may be called as a witness for the plaintiff, though left out of the declaration for that purpose, and though satisfaction from the defendant is a discharge as to him. *B. N. P.* 286. *Chapman v. Graves*, 2 *Campb.* 333 (*n*). *Morris v. Daubigny*, 5 *B. Moore*, 319. *Berkeley v. Dimery*, 10 *B. and C.* 113. *Blackett v. Weir*, 5 *B. and C.* 387. *Hall v. Curzon*, 9 *B. and C.* 647; *but see Lethbridge v. Phillips*, 2 *Stark.* 546; *and* 2 *Stark. Ev.* 764 (*n*), 1*st ed.* So a co-trespasser not joined may be called by the defendant. *Poplet v. James*, *B. N. P.* 286.

A witness who is proved to be a partner with the defendant in a contract is not competent to prove that he alone is liable to the plaintiff, for he would discharge himself from his share of the costs in case the plaintiff recovered. *Goodacre v. Breame*, *Peake*, 175. *Hall v. Rex*, 6 *Bingh.* 181. *Evans*

v. Yeatherd, 2 *Bingh.* 133, 9 *B. Moore*, 272, *S. C.* It is doubtful whether he can be rendered competent by a release from the defendant. *Young v. Bairner*, 1 *Esp.* 103. *Simons v. Smith*, *R. and M.* 29. *Cheyne v. Koops*, 4 *Esp.* 112. A co-contractor with the defendant, not joined, is a competent witness for the plaintiff. *Blackett v. Weir*, 5 *B. and C.* 385. *Fawcett v. Wrathall*, 2 *C. and P.* 305. *Hall v. Curzon*, 9 *B. and C.* 646. So upon an issue on a plea in abatement for non-joinder of another contractor, the latter is a competent witness for the plaintiff to prove that the contract was made with the defendant alone. *Hudson v. Robinson*, 4 *Mau. and S.* 475.

It was formerly held that a dormant partner not joined as plaintiff, might be called as a witness for the plaintiff on the ground that he could not be joined; *Lloyd v. Archbowle*, *Mawman v. Gillett*, 2 *Taunt.* 325; but as it is now decided that a dormant partner may be joined; *Skinner v. Stocks*, 4 *B. and A.* 437; it seems to follow that he cannot be called as a witness. 1 *Saund.* 291, *i* (*n*).

Incompetency of Husband and Wife.

Neither the husband nor the wife of a party to the suit is competent to give evidence for or against such party; *B. N. P.* 286; and so, though not a party to the suit, if the husband or wife of the witness be interested in the event of the suit. Thus, in an action by the executrix of a surviving trustee under a marriage settlement, to recover the value of certain goods sold by the defendant as sheriff under an execution against the husband of the *cestui que trust*, the husband is not competent to prove, on the part of the plaintiff, that the goods have been conveyed to the plaintiff, in trust for the separate use of the witness's wife. *Davis v. Dinwoody*, 4 *T. R.* 678. But in an action between third persons, if the evidence of the wife merely tend to expose her husband to a legal demand, or to a charge of felony; *Henman v. Dickinson*, 5 *Bingh.* 183; *R. v. Bathwick*, 2 *B. and Ad.* 639; she is not incompetent. Thus, in an action for goods sold and delivered, a woman is competent to prove that they were sold, not on the credit of the defendant, but of her husband. *Williams v. Johnson*, 1 *Str.* 504. A wife cannot be examined against her husband, in a criminal case, even with his consent. 1 *Hale, P. C.* 47. But where the plaintiff called the wife of the defendant, Best, C. J., said that he would allow her to be examined if the defendant consented, but not without. *Pedley v. Wellesley*, 3 *C. and P.* 558. A widow cannot be asked to disclose conversations between herself and her late husband. *Doker v. Hasler*, *R. and M.* 198; *but see Beveridge v. Minter*, 1 *C. and P.* 364. The evidence of a husband or wife is inadmissible, after the death or divorce

of either party, as to matters which occurred in his or her lifetime, or while the relation of marriage subsisted. *Monroe v. Twisleton, Peake, Ev. App. 5th ed.*

Whether a woman who has cohabited with a man as his wife, is on that account an incompetent witness, where he is concerned, was at one time a doubtful question. *Campbell v. Twemlow*, 1 *Price*, 81. On a trial for forgery, Lord Kenyon refused to admit a woman as a witness for the prisoner, who had in court represented her as his wife, but on hearing an objection taken to her competency, denied his marriage with her. *Id.* 83, *cited by Richards, B.* But in a late case the court of Common Pleas held that a woman who had lived with the defendant as his wife, and passed by his name, might be called as a witness for him. *Batthews v. Galindo*, 4 *Bingh.* 610. So a woman whose marriage is void by reason of her having a former husband. *Wells v. Fisher*, 1 *Moo. and Rob.* 99, 5 *C. and P.* 12, *S. C.*

Declarations of husband or wife when admissible.] Where the husband is party to the suit, the general rule is, that the declarations of the wife are not evidence against him. Thus, in trespass against husband and wife, the wife's admission of a trespass committed by her is not evidence to affect the husband. *Denn v. White*, 7 *T. R.* 112. In an action for criminal conversation with the plaintiff's wife, her letters to the defendant are not evidence for the latter, nor is her confession evidence for her husband, but conversations between her and the defendant are evidence against him. *B. N. P.* 28. Letters from the wife to the husband, written before suspicion of criminal intercourse, are admissible to show their demeanor and conduct, and whether they were living on terms of mutual affection, but it ought to be strictly proved that the letters were written at a time when the wife was not suspected of misconduct. *Edwards v. Crock*, 4 *Esp.* 39. *Trelawney v. Coleman*, 1 *B. and A.* 90. So also letters written to a third person. *Willis v. Bernard*, 8 *Bingh.* 376. And though such letters state facts not strictly evidence. *Ibid.* Where the wife has acted as the agent of the husband by his authority, her admissions will bind him in the same manner as the admissions of any other agent. *Vide ante " Admission."*

Incompetency of Counsel or Solicitor.

Who are incompetent.] Counsel; *see Curry v. Walter*, 1 *Esp.* 456; solicitors, and attornies, are the only persons who cannot be compelled to reveal communications made to them in confidence. *R. v. Duchess of Kingston*, 20 *How. St. Tr.* 612. Therefore, physicians, surgeons, and divines, are bound to disclose such communications. *Ibid.* So a clerk to the commissioners of the income tax, who is bound by his oath of office

not to disclose what he should learn as such clerk, except by the consent of the commissioners, or by force of an act of parliament, is not privileged by his oath of office from disclosing in court what he has learned as clerk. *Lee v. Birrell*, 3 *Campb.* 337. A person who acts as interpreter; *Du Barré v. Livette*, *Peake*, 78; or as agent; *Parkins v. Hawkshaw*, 2 *Stark.* 239; between the attorney and his client; or the attorney's clerk; *Taylor v. Forster*, 2 *Car. and P.* 195; *R. v. Upper Boddington*, 8 *D. and R.* 732; cannot be called upon to reveal a confidential communication. So a barrister's clerk cannot be called to prove his master's retainer. *Foote v. Hayne*, *R. and M.* 165.

Where a disclosure is made to a magistrate or agent of government relative to matters of state, the name of the person making the disclosure is not allowed to be revealed. *Vide post.*

A person who is not an attorney may be compelled to disclose communications which have been made to him under a mistaken idea that he was an attorney. *Fountain v. Young*, 6 *Esp.* 113. Where an attorney is employed both by vendor and vendee to draw a conveyance, the draft of which is perused by another attorney on behalf of the vendee; the former attorney will not be allowed to produce the draft of the conveyance contrary to the wishes of a party claiming under the vendee. *Doe v. Seaton*, 4 *Nev. and M.* 81. But in general, where two parties employ one and the same attorney, a communication by one of them to him, is not privileged, as against the other. *Baugh v. Cradocke*, 1 *Moo. and Rob.* 182. *Cleve v. Powel*, *Id.* 228.

What matters may be disclosed.] Matters communicated to an attorney, not in his professional capacity, as if he be under-sheriff at the time, must be disclosed. *Wilson v. Rastall*, 4 *T. R.* 753. So matters communicated to him after the termination of the suit, of which they were the subject, without a view to the objects of the suit. *Cobden v. Kendrick*, 4 *T. R.* 431. And so matters communicated before the retainer. *Cuts v. Pickering*, 1 *Vent.* 197. All matters not confidentially communicated must be disclosed, as well as all matters which the attorney might have known without being intrusted as attorney in the cause. *B. N. P.* 284. Thus an attorney may be called to prove a deed executed by his client, which he has attested. *Dow v. Andrews*, *Cowp.* 846. So to prove the contents of a notice to produce, or an erasure in a deed belonging to his client; *B. N. P.* 284; or the delivery of a particular paper by his client; *Eicke v. Nokes*, *M. and M.* 304; or to prove who has employed him to defend the cause; *Levy v. Pope*, *M. and M.* 410; or that he is in possession of a particular document so as to let in secondary evidence of its contents. *Bevan v.*

Waters, Id. 235. So a communication between an attorney and his client relative to a matter of fact only, where the character or office of attorney is not called into action, is not privileged. *Bramwell v. Lucas,* 2 *B. and C.* 745. The defendant's attorney may be called to prove a conversation in which his client offered to compromise with the plaintiff, on the ground that it was an open communication between adverse parties. *Griffith v. Davies,* 5 *B. and Ad.* 502, 2 *Nev. and M.* 310, *S. C.* An attorney professionally employed to prepare an assignment of goods, which he declines to make, will not be allowed to disclose the instructions given him; *Cromack v. Heathcote,* 2 *B. and B.* 4; nor to prove the contents of deeds or abstracts deposited with him. *R. v. Upper Boddington,* 8 *D. and R.* 732. But if such deeds form no part of his client's title, he is bound to produce them. *Doe v. Thomas,* 9 *B. and C.* 288. Matters communicated to an attorney for the purpose of bringing an action or suit, or relating to an action or suit, existing at the time, or contemplated, are privileged from disclosure; *Williams v. Mundie, R. and M.* 34; *and see* 2 *Swanst.* 199 (*n*); *Wadsworth v. Hamshaw, Mann. Index,* 374; and though no suit is pending, yet a communication made to an attorney in his professional character, with respect to a matter then in dispute and controversy, is privileged. *Clark v. Clark,* 1 *Moo. and Rob.* 4. *Cromack v. Heathcote,* 2 *B. and B.* 4. *Broad v. Pitt, M. and M.* 233, 3 *C. and P.* 518, *S. C.* But in Chancery it has been held, that the protection extends not merely to communications made pending an action or suit, but to every communication by the client to counsel, or attorney, or solicitor, for professional assistance. *Walker v. Wildman,* 6 *Madd.* 47. So in a very late case the Chancellor, after reviewing all the authorities, held that the privilege was not to be restricted to communications made with reference to a pending or contemplated suit or controversy, but extended to all communications made by a client to his solicitor or attorney in his professional capacity. *Greenough v. Gaskell,* 1 *Myl. and K.* 98. And this may now be regarded as the settled rule of law. *See Doe v. Harris,* 5 *C. and P.* 592. Where one S., who had drawn an indenture between a sheriff and his under-sheriff, was called to prove a corrupt agreement between them, he was not compelled to discover the matter of it, and (*per Holt, C. J.*) it seems to be the same law of a scrivener. *Anon. Skinn.* 404. *Vin. Ab.* (*B a.*) *pl.* 10. It appears that the witness had been the plaintiff's attorney. *Lilly, P. R.* 556, *S. C.*

The privilege is that of the client, and not of the attorney; and the court will prevent the attorney, though he be willing, from making the disclosure; *B. N. P.* 284; *Wilson v. Rastall,* 4 *T. R.* 759; unless the client waive the privilege, which he may do. *Merle v. More, R. and M.* 390. And if the attorney of one of the parties is called by his client, and examined as to

a matter which has been the subject of confidential communication, he may be cross-examined as to such matter, though not as to others. *Vaillant v. Dodemead*, 2 *Atk.* 524.

Incompetency from Interest, how removed.

The interest of the witness may be divested before trial by payment or release, and his competency will then be restored. Thus a legatee who has been paid before trial is a competent witness to increase the estate. *Clarke v. Gannon, R. and M.* 31. *Sewell v. Stubbs*, 1 *C. and P.* 73. So a release from the defendant, the drawer of a bill of exchange, to the acceptor, will render the latter a competent witness. *Scott v. Lifford*, 1 *Campb.* 249. In an action against a minor who appears by guardian, a release from the guardian is insufficient. *Fraser v. Marsh*, 2 *Stark.* 41. A residuary legatee is not a competent witness in an action by an executor to recover a debt due to his testator, by releasing all claim to the debt in question; for the plaintiff, though not liable to pay costs to the opposite side, must pay costs to his own attorney, which would diminish the witness's residue. *Baker v. Tyrwhitt*, 4 *Campb.* 27. If the witness offers to release or surrender his interest, and executes a release accordingly, his competency is restored, though the other party refuse to accept the release. *Bent v. Baker*, 3 *T. R.* 35. *Goodtitle v. Welford, Dougl.* 139. So if the party on whose side the witness is interested makes an offer to remove his interest, and the witness refuses, that will not deprive the party of his testimony. 1 *Phill. Ev.* 128. A release from one of several joint plaintiffs is sufficient. *Hockless v. Mitchell*, 4 *Esp.* 86. Where a witness is incompetent, on the ground that he has made himself liable to pay the attorney, a release to him by the attorney of "all fees, costs, and charges," is sufficient to restore his competency. *Doe v. Allbutt*, 6 *C. and P.* 131.

The bail for the defendant may be made a competent witness for him by the defendant's depositing, in the hands of the officer of the court, a sum equal to the sum sworn to and the costs of the action. The judge will then make an order for striking his name off the bail-piece. *Baillie v. Hole, M. and M.* 289; *and see ante, p.* 104. So a witness liable upon a bond to the costs of the action will be allowed to deposit the amount of the penalty of the bond with the officer of the court, and his evidence will then be received. *Lees v. Smith*, 1 *Moo. and Rob.* 329. *Pearcey v. Heming*, 5 *C. and P.* 503.

Examination of Witnesses.

Ordering Witnesses out of Court.] During the examination of a witness the court will, in general, on the application to either of the parties, order all the other witnesses in the cause to go out of court. But if the attorney in the cause is a wit-

ness he will be suffered to remain, his assistance being absolutely necessary to the proper conduct of the cause. *Pomeroy v. Baddeley, R. and M.* 430. *Everett v. Lowdham*, 5 *C. and P.* 91; *but see R. v. Webb*, 3 *Stark. Ev.* 1733. If the witness remains after being ordered to withdraw, it will not necessarily prevent his being examined; *R. v. Colley, M. and M.* 329; it being in the discretion of the judge to permit it or not; *Parker v. M'William*, 6 *Bingh.* 683, 4 *M. and P.* 480, *S. C.*; except in the Exchequer, where the witness is peremptorily excluded. *Att. General v. Bulpit*, 9 *Price*, 4, 6 *Bingh.* 684. In a late criminal case, Parke, J., refused to permit a witness who had remained in court, to be examined. *R. v. Wylde*, 6 *C. and P.* 380. In another case, Taunton, J., allowed the witness to be examined as to such points as had not been spoken to by the other witnesses. *Beaman v. Ellice*, 4 *C. and P.* 585.

Leading questions.] It is a general rule that leading questions are inadmissible on the examination of a witness in chief; but questions to which the answer Yes, or No, would not be conclusive, are not in general objectionable. Thus a witness called to prove that A. and B. are partners, may be asked whether A. has interfered in the business of B.; *Nicholls v. Dowding*, 1 *Stark.* 81; for though he may have interfered, he may not be a partner. So where a witness, called to prove the partnership of the plaintiffs, could not recollect their names, so as to repeat them without suggestion, but said that he might probably recognise them if suggested, Lord Ellenborough held that there was no objection to asking the witness whether certain specified persons were members of the firm. *Acerro v. Petroni*, 1 *Stark.* 100. Where a witness, on his examination in chief, shows himself decidedly adverse to the party calling him, it is in the discretion of the judge to allow the examination to assume the form of a cross-examination; and where the witness stands in a situation, which, of necessity makes him adverse to the party calling him, the counsel may, as a matter of right, examine him as upon a cross-examination. *Clarke v. Saffery, R. and M.* 126.

Where a witness for the plaintiff was cross-examined as to the contents of a lost letter, and swore that it did not contain a certain passage, and a witness was called by the defendant to contradict this statement, Lord Ellenborough ruled, that after exhausting the memory of the latter witness as to the contents of the letter, he might be asked if it contained a particular passage recited to him, which had been sworn to on the other side, for that otherwise it would be impossible ever to come to a direct contradiction. *Courteen v. Touse*, 1 *Campb.* 43. Where a witness is called to prove a contradictory statement, made by another witness, the most unexceptionable and proper course appears to be, to ask the witness what the other witness said

relative to the transaction in question, or what account he gave, and not in the first instance to ask whether he said so and so, or used such and such expressions. 1 *Phill. Ev.* 257. However, where, in cross-examination, a witness being asked as to some expressions which he had used, denied them, and the counsel on the other side called a person to prove that the witness had used such expressions, and read to him the particular words from his brief, Abbott, C. J., held, that he was entitled to do so. *Edmonds v. Walter*, 3 *Stark.* 7.

Cross-examination.] Upon cross-examination, counsel may lead a witness so as to bring him directly to the point as to the answer; but he cannot, if the witness show a leaning in his favour, go the length of putting into the witness's mouth the very words which he is to echo back again. *Hardy's case*, 24 *How. St. Tr.* 755. It is not competent to counsel, on cross-examination, to question a witness concerning a fact wholly irrelevant (if answered affirmatively) to the matter in issue, for the purpose of discrediting him if he answers in the negative, by calling other witnesses to disprove what he says; *Spenceley v. De Willott*, 7 *East*, 109; and should the witness answer such question, evidence cannot be given to contradict him. *Harris v. Tippett*, 2 *Campb.* 637. *R. v. Watson*, 2 *Stark.* 157. Where a witness is brought into court merely for the purpose of producing a written instrument to be proved by another witness, he need not be sworn; and unless sworn, the other party will not be entitled to cross-examine him. *Simpson v. Smith*, *MS.* 1822. 1 *Phill. Ev.* 260. *Davis v. Dale*, *M. and M.* 514. *Perry v. Gibson*, 1 *Ad. and Ell.* 48, *ante p.* 82. When once sworn, though he give no evidence for the party calling him, a witness may be cross-examined. *Phillips v. Eamer*, 1 *Esp.* 357. But where a person called to produce a document was sworn by mistake, and asked a question, which he did not answer, it was held that the opposite party was not entitled to cross-examination. *Rush v. Smith*, 1 *Crom. M. and R.* 94. A witness called by the plaintiff, and cross-examined by the defendant, and afterwards recalled by the latter, may still be examined as upon the cross-examination. *Dickinson v. Shee*, 4 *Esp.* 67.

A witness cannot properly be asked, on cross-examination, whether he has written such a thing; the right course is to put the writing into his hands, and ask him whether it is his writing. *Queen's case*, 2 *B. and B.* 293. If, on cross-examination, a witness admits a letter to be in his handwriting, he cannot be questioned by counsel whether statements such as they may suggest are contained in it, but the whole of the letter must be read in evidence. *Id.* 288. According to the ordinary rule of proceeding, the letter is to be read as the evidence of the cross-examining counsel, as part of his evidence

in his turn, after he shall have opened his case; but if the cross-examining counsel suggest to the court that he wishes to have the letter read immediately, in order that he may found certain questions on the contents of that letter, which could not be well or effectually done without reading the letter itself, it may be permitted to be read as part of the evidence of the counsel proposing it, and subject to all the consequences of having it received as part of his evidence. *Id.* 290. But a witness on cross-examination may admit not having mentioned a fact on a former examination, though that examination is in writing and not produced. *Ridley v. Gyde,* 1 *M. and R.* 197.

If a wrong witness is called in consequence of a mistake in his name, and is dismissed on the discovery of the mistake, the other side have no right to cross-examine him. *Clifford v. Hunter,* 3 *C. and P.* 16. It is in the discretion of the judge whether he will permit a witness to be re-called. *Adams v. Bankart,* 1 *Crom. M. and R.* 681.

Re-examination.] A re-examination, which is allowed only for the purpose of explaining any facts which may come out on cross-examination, must be confined to the subject matter of the cross-examination. 1 *Stark. Ev.* 179, 2*nd ed.* The rule with regard to re-examinations is thus laid down by Abbott, C. J., in *the Queen's case,* 2 *Br. and Bingh.* 297. "I think the counsel has a right, on re-examination, to ask all questions which may be proper to draw out an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, and also of the motive by which the witness was induced to use those expressions; but he has no right to go further, and introduce matter new in itself, and suited to the purpose of explaining either the expressions or the motives of the witness." "I distinguish between a conversation which a witness may have had with a party to a suit, whether criminal or civil, and a conversation with a third person. The conversations of a party to the suit relative to the subject matter of the suit, are in themselves evidence against him, in the suit; and if a counsel chooses to ask a witness as to any thing which may have been said by an adverse party, the counsel for that party has a right to lay before the court all that was said by his client in the same conversation; not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination, provided only that it relate to the subject matter of the suit; because it would not be just to take part of a conversation as evidence against the party, without giving the party at the same time the benefit of the entire residue of what he said on the same occasion."

Credit of witness, how impeached and supported.] In order to impeach the credit of a witness, evidence may be given of statements made by him, at variance with his testimony on the trial; *De Sailly v. Morgan*, 2 *Esp.* 691; but to lay a foundation for the evidence of such contradictory declaration or conversation, the witness must be asked, on cross-examination, whether he has made such declaration, or held such conversation. *Queen's case*, 2 *B. and B.* 301. Before you can contradict a witness by showing that he has, at some other time, said something inconsistent with his present evidence, you must ask him as to the time, place, and person involved in the supposed contradictions. It is not enough to ask him the general question, whether he has ever said so and so. *Per Tindal, C. J., Angus v. Smith, M. and M.* 474. Where the witness merely states that he does not recollect making the statement, evidence to prove that he made the statement is inadmissible; there must be an express denial. *Pain v. Beeston*, 1 *Moo. and Rob.* 20. The witness may be re-examined as to these contradictory statements. *Vide ante p.* 119. It has been doubted, whether, to corroborate the testimony of the witness whose credit has been impeached, evidence is admissible that the witness affirmed the same thing before, on other occasions; *Gilb. Ev.* 150, *B.N.P.* 294; but such evidence has been held inadmissible, on the ground of its not being given on oath. *R. v. Parker*, 3 *Dougl.* 242; *but see Luttrel v. Reynell*, 1 *Mod.* 283. *See also* 2 *Evans's Pothier*, 251, 1 *Stark. Ev.* 149, 2 *Russ. on Crimes*, 635, 2*d edit.* This may now be considered the established rule, but it has been observed that it is subject to this exception, that where the counsel on the other side impute a design to misrepresent from some motive of interest or friendship, it may, in order to repel such an imputation, be proper to show that the witness made a similar statement at a time when the supposed motive did not exist, or when motives of interest would have prompted him to make a different statement of the facts. 1 *Phill. Ev.* 293. So it is said by Sir W. D. Evans, "If a witness speaks to facts negativing the existence of a contract, and insinuations are thrown out that he has a near connexion with the party, on whose behalf he appears; that a change of market, or any other alteration of circumstances, has excited an inducement to recede from a deliberate engagement, the proof by unsuspicious testimony, that a similar account was given when the contract alleged had every prospect of advantage, removes the imputation resulting from the opposite circumstances, and the testimony is placed upon the same level which it would have had, if the motives for receding from a previous intention never had existed. Upon an accusation for rape, where the forbearing to mention the cir-

cumstance for a considerable time, is itself a reason for imputing fabrication, unless repelled by other considerations, the disclosure made of the fact upon the first proper opportunity after its commission, and the apparent state of mind of the party who has suffered the injury, are always regarded as very material, and the evidence of them is constantly admitted without objection." *Notes to Pothier on Oblig. vol.* ii. *p.* 251.

If a witness gives evidence contrary to that which the party calling him expects, that party cannot give general evidence to show that the witness is not to be believed on his oath. *Ewer v. Ambrose,* 3 *B. and C.* 749. It is a question whether it is competent to him to prove that the witness has previously given a different account of the transaction. *Id.* The point arose in a late case where the plaintiff having called a witness who gave evidence contrary to that which was expected from him, showed that he had made a different statement to his attorney previously to the trial. Denman, C. J., and Bolland, B., (Justices of the C. P. at Lancaster,) differed in opinion as to the reception of this evidence. *Wright v. Beckett,* 1 *Moo. and Rob.* 414. *See R. v. Oldroyd, Russ. and Ry. C. C.* 88. The better opinion appears to be that such evidence is admissible, and this view is supported by the learned argument of the Lord Chief Justice. At all events the party may prove the facts denied, by other witnesses. *Lowe v. Joliffe,* 1 *W. Bl.* 365. *Alexander v. Gibson,* 2 *Campb.* 555. *Richardson v. Allan,* 2 *Stark.* 334. In an action upon a policy of insurance against fire, one issue was, whether or not goods of the plaintiff had been destroyed by fire as alleged in the declaration. A witness was called for the plaintiff to prove that part of the goods were supplied to the plaintiff by him before the fire, but on being shown an invoice and letter relating to such goods, he stated that they were written by him, but that he never delivered such goods to the plaintiff; and he deposed that the letter supposed to have been sent from Edinburgh, was written by him in London at the desire of the plaintiff; that the invoice was drawn up by him, the witness, after the fire, in the presence of the plaintiff's son and shopman, and that the son and shopman persuaded him to state that the goods had been sent according to the invoice and letter. It was held, that the son and shopman, who had already been examined for the plaintiff, might have been called back to contradict all these statements. *Friedlander v. The London Assurance Company,* 4 *B. and Ad.* 193. Where a party calls other witnesses to contradict his own witness as to a particular fact, the whole of the testimony of the contradicted witness is not therefore to be repudiated by the judge. *Bradley v. Ricardo,* 8 *Bingh.* 57.

Privilege of not answering questions.] Where a question is

asked, the answer to which would tend to expose the witness to punishment, or to a criminal charge, as to convict him of the offence of usury, *Cates v. Hardacre*, 3 *Taunt.* 424, he cannot be compelled to answer; *see the cases collected*, 1 *Phill. Ev.* 262; and therefore such questions ought not to be put. *Cundell v. Pratt*, *M. and M.* 108. With regard to questions *tending* only to criminate, it was said by Lord Eldon, that the distinction was so nice, that it was the strong inclination of his mind to protect the party, not only against any question that has a direct tendency to criminate him, but that forms one step towards it. *Paxton v. Douglas*, 19 *Ves.* 227. *Claridge v. Hoare*, 14 *Ves.* 59. *Swift v. Swift*, 4 *Hagg. Eccl.* 154. If the time limited for the recovery of the penalty has expired, the witness may be compelled to answer. *Roberts v. Allatt*, *M. and M.* 192. And if a witness answers any questions on a matter rendering him liable to forfeiture or punishment, he cannot afterwards claim his privilege, but must answer throughout. *East v. Chapman*, *M. and M.* 47. Even though it may affect his life. *Per Dampier J., Mann. Index*, 336. The objection to such questions must come from the witness and not from the counsel in the cause; *Thomas v. Newton*, *M. and M.* 48; and the counsel who calls the witness will not be allowed to argue in support of the objection. *R. v. Adey*, 1 *Moo. and Rob.* 94. So he cannot be compelled to answer questions which might subject him to a forfeiture of his estate. 1 *Phill. Ev.* 264. *And see stat.* 46 *Geo.* 3, *c.* 37. But a witness cannot legally refuse to answer a question relevant to the matter in issue (the answering of which has no tendency to accuse himself, or to expose him to penalty or forfeiture of any kind or nature whatsoever), on the ground that the answering of such question may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit. 46 *Geo.* 3, *c.* 37. A witness is not compellable to answer questions which are degrading to his character; *Cooke's case*, 13 *How. St. Tr.* 334; *Freind's case*, 13 *How. St. Tr.* 17; *Layer's case*, 16 *How. St. Tr.* 161; though it seems that such questions may legally be asked. *R. v. Edwards*, 4 *T. R.* 440. *R. v. Holding*, *Archb. Cr. Law*, 102. *Cundell v. Pratt*, *M. and M.* 108. *And see the cases collected*, 1 *Phill. Ev.* 269. If the witness chooses to answer the question, his answer is conclusive. 2 *Watson's Trial, by Gurney*, 288; *see also Rose v. Blakemore*, *R. and M.* 383.

A witness is not compellable, or indeed allowed to reveal communications, the disclosure of which might be injurious to the interests of the state. Thus, questions tending to the discovery of the channels by which a disclosure of treasonable transactions was made to the officers of justice, are not permitted to be asked. *Hardy's case*, 24 *How. St. Tr.* 814. *R. v. Watson*, 2 *Stark.* 136. So communications between the governor of a colony and his attorney-general are confidential,

and cannot be disclosed. *Wyatt v. Gore, Holt*, 299; *and see Cooke v. Maxwell*, 2 *Stark*. 184. So also a letter written by an agent of government to one of the secretaries of state. *Anderson v. Hamilton*, 2 *B. and B*. 156 (*n*). But this rule is confined to communications made by and between ministers and officers of the government in the discharge of their public duty; and therefore a letter written by a private individual to the secretary of the post-master general, complaining of the conduct of the guard of a mail, is not privileged from disclosure. *Blake v. Pilfold*, 1 *Moo. and Rob*. 198.

Opinion of witness when admissible.] In general the opinion of a witness as to any of the facts in issue is inadmissible as evidence, unless upon questions of skill and judgment. Thus in an action of trespass for cutting a bank, where the question is whether the bank, which had been erected for the purpose of preventing the overflowing of the sea, had caused the choking up of a harbour, the opinions of scientific men as to the effect of such an embankment upon the harbour are admissible. *Folkes v. Chadd*, 3 *Dougl*. 157. 1 *Phill. Ev*. 276, *S. C*. 4 *T. R*. 498, *S. C. cited*. And where the question is, whether a seal has been forged, seal engravers may be called to show a difference between a genuine impression and that supposed to be false. *Ibid. per Lord Mansfield*. So a physician who has not seen the particular patient, may, after hearing the evidence of others, be called to prove, on oath, the general effects of the disease described by them, and its probable consequences in the particular case. *Peake, Ev*. 208. *R. v. Searle*, 1 *Moo. and Rob*. 75. The opinion of a person conversant with the business of insurance may be asked, as to whether the communication of particular facts would have varied the terms of insurance, but not as to what his conduct would have been in the particular case. *Berthon v. Loughman*, 2 *Stark*. 258. *Rickards v. Murdock*, 10 *B. and C*. 527. *Camden v. Cowley*, 1 *W. Bl*. 417. *R. v. Wright, Russ. and Ry. C. C. R*. 456. *But see Durrell v. Bederley, Holt*, 286; 10 *Bingh*. 57; *and see ante p*. 88, *as to the evidence of persons skilled in forgeries*. So a letter from the supercargo of a ship, detailing the circumstances in which the ship was placed, may be put into the hands of a similar witness, in an action for negligence for not effecting an alteration in a policy pursuant to instructions. *Aspinall v. Wake*, 10 *Bingh*. 51. So the evidence of a ship-builder has been admitted on a question of sea-worthiness, though he was not present at the survey. *Thornton v. Royal Exchange Ass. Co. Peake*, 25. So a person versed in the laws of a foreign country may give evidence as to what, in his opinion, would, according to the law of that country, be the effect of certain facts. *R. v. Wakefield, Murray's ed*. 238. *Chaurand v. Angerstein, Peake*, 44.

Memorandum to refresh witness's memory.] A witness will be allowed to refer to an entry, or memorandum, made by himself shortly after the occurrence of the fact to which it relates, in order to refresh his memory, and this though the entry or memorandum would not of itself be evidence; *Kensington* v. *Inglis*, 8 *East*, 289; as a receipt on unstamped paper. *Rambert v. Cohen*, 4 *Esp.* 213. But he cannot refresh his memory by extracts from a book not made by himself. *Doe v. Perkins*, 3 *T. R.* 749, 4 *Nev. and M.* 207. But where a witness, on seeing his initials affixed to an entry of payment, said, "I have no recollection that I received the money; I know nothing but by the book, but seeing my initials I have no doubt that I received the money," this was held sufficient evidence. *Maugham v. Hubbard*, 8 *B. and C.* 14. *R. v. St. Martin, Leicester*, 4 *Nev. and M.* 202. A witness may refresh his memory by reference to entries in a book, which he did not write with his own hand, but which he examined from time to time while the events recorded were fresh in his recollection; *Burrough v. Martin*, 2 *Campb.* 112; but he will not be allowed to refresh his memory with a *copy* of a paper made by himself six months after he wrote the original, though the original is proved to be so covered with figures as to be unintelligible. *Jones v. Stroud*, 2 *C. and P.* 196. However, in one case where a witness refreshed his memory from a paper not written by himself, Lord Ellenborough said, that it was sufficient if a man could positively swear that he recollected the fact, though he had totally forgotten the circumstance before he came into court; and if, upon looking at any document, he can so far refresh his memory as to recollect a circumstance, it is sufficient. *Henry v. Lee*, 2 *Chitty*, 124. Where a clerk made entries of goods delivered in a waste book, and the master, from the waste book, made entries in the ledger, in the presence of the clerk, who checked them with the waste book, it was held that the clerk might refresh his memory by looking at the ledger which was not to be considered a copy, and that the waste book need not be produced. Patteson, J., observed, that this decision did not establish the rule that a witness might refresh his memory from a copy. *Burton v. Plummer*, 4 *Nev. and M.* 315. If the witness be blind, the paper may be read over to him. *Catt v. Howard*, 3 *Stark.* 4. Where a paper is put into the hands of a witness to refresh his memory, the counsel on the other side has a right to inspect it, without being bound to read it in evidence. *Sinclair v. Stevenson*, 1 *C. and P.* 582. *R. v. Ramsden*, 2 *C. and P.* 603.

EFFECT OF EVIDENCE.

Under the present head will be collected the most material cases relating to the effect of judgments, verdicts, and other judicial proceedings, of instruments of state, of public books and registers, and lastly of awards.

First, with regard to the effect of judgments and verdicts in the superior courts of this country.

Effect of Judgments and Verdicts.

Effect of judgments and verdicts in the superior courts, with regard to the parties.] It is a general principle that a transaction between two parties in a judicial proceeding ought not to be binding upon a third; for it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment which he might think erroneous. And therefore the depositions of witnesses in another cause, in proof of a fact, the verdict of a jury finding a fact, and the judgment of the court on facts found, although evidence against the parties, and all claiming under them, are not in general to be used to the prejudice of strangers. *Per De Grey, C. J., Duch. of Kingston's case*, 20 *How. St. Tr.* 538. In order to bind the party he must have sued, or been sued, in the same character in both suits. Thus in an action by an executor on a bond, he will not be estopped by a judgment in an action brought by him, as administrator, on the same bond, but he may show the letters of administration repealed. *Robinson's case*, 5 *Rep.* 32 *b*. In considering the effect of judgments the court will look to the real parties to the suit. Thus a verdict in trespass against a person who justified as servant of J. S., was allowed to be given in evidence against the defendant, who also acted under J. S., J. S. being considered the real defendant in both causes. *Kinnersley v. Orpe, Dougl.* 517. *Simpson v. Pickering*, 1 *Crom. M. and R.* 527. But such evidence is not conclusive. *Outram v. Morewood*, 3 *East*, 366. So a verdict against one defendant is evidence in a second action against the same, and other defendants, if the latter claim under the first defendant. *Strutt v. Bovingdon*, 5 *Esp.* 58. *Gilb. Ev.* 32. On a plea of usury to an action on a bond, a verdict of acquittal in an action for penalties for usury on the same bond between the same parties, is admissible for the plaintiff. *Cleve v. Powel*, 1 *M. and Rob.* 228.

Effect of judgments and verdicts in the superior courts, with regard to privies.] *Privies* stand in the same situation as those to whom they are privy. Thus a privy in blood, as an heir, may give in evidence a verdict for, and is bound by a verdict against, his ancestor. *Locke v. Norborne*, 3 *Mod.* 141; *see*

Outram v. Morewood, 3 *East*, 346. So of privies in estate. Therefore, if there be several remainders limited by the same deed, a verdict for one in remainder may be given in evidence for one next in remainder. *Pyke v. Crouch*, 1 *Ld. Raym.* 730. *B. N. P.* 232. *See Doe v. Tyler*, 6 *Bingh.* 390. So a verdict for or against a lessee, is evidence for or against him in reversion. *Com. Dig. Ev.* (*A.* 5), *Gilb. Ev.* 35. 1 *Phill. Ev.* 308; *but see B. N. P.* 232, 1 *Stark. Ev.* 192. So of privies in law; thus a verdict against an intestate, or testator, binds his representatives. *R. v. Hebden, Andr.* 389. In the same manner a judgment against the schoolmaster of a hospital, concerning the rights of his office, is evidence against his successor. *Travis v. Chaloner*, 3 *Gwill.* 1237. Upon the same principle a judgment of ouster against a mayor was allowed to be given in evidence to prove the ouster, in a *quo warranto* against a third person, admitted by him; *R. v. Hebden*, 2 *Str.* 1109, *B. N. P.* 231, 2 *Selw. N. P.* 1089, *S. C.*; but such evidence is not conclusive. *R. v. Grimes*, 5 *Burr.* 2598.

Effect of judgments or verdicts in the superior courts, with regard to strangers.] There are several exceptions to the general rule, that no one shall be bound by a judgment to which he is not party or privy. In the case of customs, or tolls, verdicts, whether recent or ancient, respecting the same custom or toll, are evidence between other parties. *City of London v. Clerke, Carth.* 181, *B. N. P.* 233. So in the case of customary commoners, a verdict in an action for or against one, is evidence for or against another, claiming in the same right. *Per Lord Kenyon, Reed v. Jackson*, 1 *East*, 357. So a verdict with regard to a public right of way. *Id.* 355. But the verdict in such cases is not conclusive. *Biddulph v. Ather*, 2 *Wils.* 23. The judgment *in rem*, of a court of exclusive jurisdiction, is conclusive as to all the world, *vide post, p.* 130. Where a judgment is offered in evidence, merely for the purpose of proving the fact that such a judgment has been obtained, and not with a view to prove the facts upon which the judgment was founded, it may be evidence for or against a stranger. Thus a verdict against a master, in an action for the negligence of his servant, is evidence, in an action by the master against the servant, to prove the amount of damages. *Green v. New River Co.* 4 *T. R.* 590.

Effect of judgments and verdicts, with regard to the subject matter of the suit.] A judgment between the same parties, and upon the same cause of action, is conclusive; and if the *cause* of action is the same, it is immaterial that the *form* of action is different. Thus a verdict in trover is a bar in an action for money had and received, brought for the value of the same goods. *Hitchen v. Campbell*, 2 *W. Bl.* 827. So a judg-

ment in debt is a bar in an action of assumpsit on the same contract. *Slade's case*, 4 *Rep*. 94 *b*. So a judgment in trespass, in which the right of property is determined, is a bar in trover for the same taking. *Com. Dig. Action* (*K*. 3). If the party mistake his form of action, and fail on that account, the judgment in such action will not conclude him. *Ferrars v. Arden, Cro. Eliz*. 668. 2 *Saund*. 47, *p* (*n*). *Godson v. Smith*, 2 *B. Moore*, 157. If the plaintiff omit to give any evidence of a demand which he might have recovered in a former action he will not be precluded from giving evidence of it in a subsequent action. *Seddon v. Tutop*, 6 *T. R*. 607; *and see Ravee v. Farmer*, 4 *T. R*. 146. *Thorp v. Cooper*, 5 *Bingh*. 129. But where the declaration in the second action is framed in such a manner that the causes of action may be the same as those in the first suit, it is incumbent on the party bringing the second action to show that they are not the same. *Lord Bagot v. Williams*, 3 *B. and C*. 239.

A judgment is only evidence where it is directly upon the point in question, and is not evidence of any matter which came collaterally in question, or of any matter incidentally cognizable, or of any matter to be inferred by argument from the judgment. *Duch. of Kingston's case*, 20 *How. St. Tr*. 533. *Blackham's case*, 1 *Salk*. 290.

Effect of judgments and verdicts in the superior courts, with regard to the manner in which they are taken advantage of.] A judgment upon the same point, between the same parties, will operate as an estoppel, if so pleaded in a second action; but if only offered in evidence, and not so pleaded, it is not conclusive. *Outram v. Morewood*, 3 *East*, 365. *Stafford v. Clark*, 2 *Bingh*. 381, 9 *B. Moore*, 724, *S. C. Hooper v. Hooper*, *M'Cl. and Y*. 509. Thus, where an action was brought for widening a water channel to the damage of the plaintiff's mill, it was held that a verdict obtained by the defendant, on a former action brought by the plaintiff for the same cause, but not pleaded as an estoppel, was not conclusive, but only evidence to go to the jury. *Vooght v. Winch*, 2 *B. and A*. 662.

Admissibility, in civil cases, of verdicts in criminal cases.] It has been said, that a conviction in a court of criminal jurisdiction, is evidence of the same fact, coming collaterally into controversy in a court of civil jurisdiction. *B. N. P*. 245; *and see Gilb. Ev*. 30. Where the conviction has been procured on the evidence of the party who seeks to avail himself of it in a civil action, it has been decided that such conviction is inadmissible: and it seems also to be very doubtful whether it is admissible when it has been procured, not on the sole evidence of the party, or even where it has been procured entirely on the evidence of others. *Hillyard v. Grantham, cited* 2 *Ves. sen*. 246. *Gibson v. Maccarty, Rep. temp. Hardw*. 311. *Hath-*

away v. Barrow, 1 *Campb.* 151. *Burdon v. Browning*, 1 *Taunt.* 520. *Brook v. Carpenter*, 3 *Bing.* 300. 2 *Evans's Pothier*, 313. But a conviction procured on the evidence of one of several defendants, has been ruled to be admissible for the others. *Davis v. Nest*, 6 *C. and P.* 167. If on an indictment for an assault the defendant pleads guilty, the record is said to be evidence in an action for damages for the same assault, like any other admission by the party. *Tr. per Pais*, 30. *Anon.* 1 *Phill. Ev.* 320. But the contrary has been ruled by Lord Tenterden at Nisi Prius. 2 *Phill. Ev.* 203, 7*th edit.*

Effect of Sentences in the Ecclesiastical Courts.

The Ecclesiastical Courts having the exclusive right of deciding directly upon the legality of marriages, the temporal courts receive the sentences of the ecclesiastical courts, upon such questions, as conclusive evidence of the fact; *Bunting's case*, 4 *Rep.* 29 *a*; upon the principle that the judgment of a court of exclusive jurisdiction, directly upon the point, is conclusive upon the same parties, upon the same matter coming incidentally in question in another court, for a different purpose. *Duch. of Kingston's case*, 20 *How. St. Tr.* 538, 540. So a sentence in a suit of jactitation of marriage, is evidence in an action in a court of common law to disprove the marriage. *Jones v. Bow, Carth.* 225. In the last-mentioned case such sentence was held to be *conclusive* evidence, but in this point the authority of that decision has been overthrown, for a sentence in a suit of jactitation has only a negative and qualified effect, *viz.* that the party has failed in his proof, leaving it open to new proofs of the same marriage, in the same cause, and does not conclude even the court which pronounces it. *Duch. of Kingston's case*, 20 *How. St. Tr.* 543; *and see Blackham's case*, 1 *Salk.* 290, *and Harg. Law Tracts*, 451.

The Ecclesiastical Courts have also the exclusive right of deciding directly on the validity of wills of personalty, and on the granting of administration. *Noell v. Wells*, 1 *Lev.* 235. A probate therefore is conclusive till it be repealed, and no court of common law can admit evidence to impeach it. *Allen v. Dundas*, 3 *T. R.* 125. *See Harg. Law Tracts*, 459. On this ground the payment of money to an executor, who has obtained probate of a forged will, is a discharge to the debtor of the intestate, though the probate be afterwards declared null. *Ibid.* But letters of administration are not evidence of any fact which can only be inferred from them, as the intestate's death. *Thompson v. Donaldson*, 3 *Esp.* 63. 20 *How. St. Tr.* 533. Though it cannot be shown in a court of common law that the Ecclesiastical Court has erred in granting probate, yet evidence may be given to show that the Ecclesiastical Court had no jurisdiction, as that there were no *bona notabilia* within its jurisdiction, *B. N. P.* 247, or that the supposed intestate is alive. *See Allen v. Dundas*, 3 *T. R.* 130. So the letters of

administration may be proved to be revoked, for this is in affirmance of the proceedings of the spiritual court. *B. N. P.* 247. So it may be shown that the seal of the ordinary has been forged, for that does not impeach the judgment of the court; but it cannot be shown that the will was forged, or that a testator was *non compos mentis*, or that another person was appointed executor; *Ibid. Noell v. Wells*, 1 *Lev.* 236; for those questions are decided by the judgment of the Ecclesiastical Court.

Effect of Sentences in the Court of Admiralty.

Upon questions of prize the Court of Admiralty has exclusive jurisdiction, and therefore a sentence of condemnation in that court is conclusive, and being a proceeding *in rem* it binds all the world. *Kinnersley v. Chase, Park, Ins.* 490, *6th ed.* And the sentence of a foreign Court of Admiralty also is, by the comity of nations, held to be conclusive upon the same question arising in this country. *Hughes v. Cornelius*, 2 *Show.* 232. *Bolton v. Gladstone*, 5 *East*, 160. But the sentence of a Court of Admiralty, sitting under a commission from a belligerent power, in a neutral country, will not be recognised in our courts. *Havelock v. Rockwood*, 8 *T. R.* 268. *Donaldson v. Thompson*, 1 *Campb.* 429. The sentence is only evidence of what is positively affirmed in it, not of what is to be gathered by inference from it. *Fisher v. Ogle*, 1 *Campb.* 418. *Horneyer v. Lushington*, 3 *Campb.* 89, *but see Lothian v. Henderson*, 3 *B. and P.* 525. If the property is condemned on the ground of its not being neutral, the sentence is conclusive evidence of that fact. *Barzillay v. Lewis, Park, Ins.* 469, *6th ed.* So where no special ground is stated, but the ship is condemned generally as a good and lawful prize, it is to be presumed that the sentence proceeded on the ground of the property belonging to an enemy, and the sentence will be conclusive evidence of that fact. *Saloucci v. Woodmas, Park, Ins.* 471, 3 *Dougl.* 345, *S. C.* But where there is some ambiguity in the sentence of a foreign Court of Admiralty, so that the precise ground of the determination cannot be collected, the courts here may examine the ground on which the sentence proceeded. *Bernardi v. Motteux, Dougl.* 574. And if the condemnation does not plainly proceed upon the ground of enemies' property, or of the ship not having complied with subsisting treaties between her own country and that of the capturing power, but on the ground of regulations arbitrarily imposed by the latter, to which neither the government of the captured ship nor the other powers of Europe have been made parties, such a condemnation will not be admitted as conclusive against a warranty of neutrality. *Pollard v. Bell*, 8 *T. R.* 444. *Baring v. Clagett*, 3 *B. and P.* 215; *see Bolton v. Gladstone*, 5 *East*, 155, 2 *Taunt.* 85. In order to conclude the parties from contest-

ing the ground of condemnation, such ground must appear clearly upon the face of the sentence; it must not be collected by inference only, or left in uncertainty whether the ship was condemned upon one ground which would be a just ground of condemnation by the laws of nations, or upon another ground which would amount only to a breach of the municipal regulations of the condemning country. *Per Tindal, C. J., Dalgleish v. Hodgson,* 7 *Bingh.* 504.

Effect of Judgments in rem.

A judgment of condemnation of goods in the Court of Exchequer upon a proceeding *in rem,* is conclusive evidence as to all the world, and, therefore, after such judgment, trespass will not lie against the officer who seised the goods, to try the point of forfeiture again. *Scott v. Shearman,* 2 *W. Bl.* 977. But if the proceeding was *in personam* merely, as a conviction for penalties, and not *in rem,* the judgment is not evidence in any case in which the parties are different. *Hart v. M'Namara,* 4 *Price,* 154 (*n*). So the judgment of commissioners of excise, on an information for an offence against an excise law, is conclusive; *Fuller v. Fotch, Carth.* 346; and binds a stranger. *Roberts v. Fortune, Harg. Law Tracts,* 468 (*n*). 1 *Phil. Ev.* 337; *but see Henshaw v. Pleasance,* 2 *W. Bl.* 1174, *contra. See also* 1 *Ridgway, Irish T. R.* 1. 2 *Evans's Pothier,* 307. It has been said that an acquittal in the Court of Exchequer, upon a seizure made for want of a permit, is conclusive evidence that the permit was regular; *Per Lord Kenyon, Cooke v. Sholl,* 5 *T. R.* 255; *Vin. Ab. Evid.* (*A. b.* 22); but this opinion has been, with reason, questioned; for the acquittal does not, like a conviction, ascertain any precise fact, and may have proceeded merely on the ground that sufficient evidence was not produced. 1 *Phil. Ev.* 338.

Effect of Proceedings in Equity.

Bill in Chancery.] It is laid down in a book of authority, that a bill in Chancery is evidence against the complainant, for the allegations of every man's bill shall be supposed true, nor shall it be supposed to be preferred by a counsel or solicitor, without the party's privity, and therefore it amounts to a confession, and admission of the truth of the fact, and if the counsel have mingled with it any fact that is not true, the party may have his action; but in order to make the bill evidence against the complainant, there must be proceedings upon it. *B. N. P.* 235. *Snow v. Phillips,* 1 *Sid.* 221. *Taylor v. Cole,* 7 *T. R.* 3 (*n*). *Gilb. Ev.* 49. 1 *Stark. Ev.* 286. But it is said by Lord Kenyon, that a bill in Chancery is never admitted in evidence, further than to show that such a bill did exist, and that certain facts were in issue between the parties. *Doe v. Sybourn,* 7 *T. R.* 3. 1 *Phill. Ev.* 341. *Ferrers v. Shirley,*

Fitz. 197. So in the *Banbury Peerage case*, 2 *Selw. N. P.* 714, to a question whether a bill in Chancery can ever be received in evidence, in a court of law, to prove any facts either alleged or denied in such bill, the judges answered, that generally speaking a bill in Chancery cannot be received in evidence in a court of law to prove any fact, either alleged or denied in such bill. But whether any possible case might be put, which would form an exception to such general rule, the judges could not undertake to say. At all events a bill in equity cannot be received as evidence against a party not claiming, or deriving in any manner under either the plaintiff or defendant in the Chancery suit. *Ibid. See* 1 *M. and R.* 667, 7 *B. and C.* 789.

Answer.] An answer in Chancery is good evidence against the defendant, as an admission on oath, and it must all be taken together; therefore, if, upon exceptions taken, a second answer has been put in, the defendant may insist upon having that read to explain what he swore in his first answer. *B. N. P.* 237. *Gilb. Ev.* 50. Where one party reads part of the answer of the other party in evidence, he makes the whole admissible only so far as to waive any objection as to the competency of the testimony of the party making the answer, and he does not thereby admit as evidence, facts which may happen to have been stated by way of hearsay only; *Per Chambre, J., Roe v. Ferrars*, 2 *B. and P.* 548; but this point does not appear to have been judicially decided. *See ante* "*Admissions.*"

The answer of a guardian is no evidence against an infant, nor the answer of a trustee against a *cestui que trust*. *B. N. P.* 237. But an answer will be evidence against privies; thus an answer in a suit for tithes, instituted by a vicar against the rector and others (owners of lands in the parish), in which answer the defendants declared the tithes to belong to the rector, will be evidence in an action for tithes, by a succeeding rector against owners of the same lands. *Dartmouth v. Roberts*, 16 *East*, 334. The answer of one defendant is not evidence against a co-defendant; *Wych v. Meal*, 3 *P. Wms.* 311; but after evidence has been given to connect two persons as partners, the answer of one will be evidence against the other. *Grant v. Jackson, Peake*, 203, *supra.* Whether the answer of a married woman can be used as evidence against her, after her husband's death, has never been expressly decided. *Wrottesley v. Bendish*, 3 *P. Wms.* 235. *See* 1 *Stark. Ev.* 290, 1*st ed.*

Depositions.] Depositions in Chancery may be given in evidence, in an action at law in the same matter, between the same parties, where the witness is dead, or cannot be found, or has fallen sick by the way. *B. N. P.* 239. *Gilb. Ev.* 60. But they are not evidence against a person who does not claim under the plaintiff or defendant in the Chancery suit. *Ban-*

bury Peerage case, cited 1 *M. and R.* 667, 7 *B. and C.* 789. Depositions relating to a question of custom or tolls, upon which hearsay would be good evidence, *ante p.* 126, may be read against a person who was no party to the former suit. *B. N. P.* 239. So a deposition taken in a cause between other parties, will be admitted to be read to contradict what the same witness swears at a trial. *B. N. P.* 240.

Decree.] A decree in Chancery may be given in evidence between the same parties, or any claiming under them. *B. N. P.* 243.

Order.] An order for an attachment for non-payment of the costs in a suit in equity is in itself *primâ facie* evidence that a suit has been pending. *Blower v. Hollis,* 1 *Crom. and M.* 393.

Effect of Judgments of Foreign Courts.

The sentence of a foreign court of competent jurisdiction directly deciding a question, cognisable by the law of the country, seems to be conclusive here, if the same question arise incidentally between the same parties, provided the sentence be conclusive by the law of the foreign country. *See Roach v. Garvan,* 1 *Ves. sen.* 159. *Burrows v. Jemino,* 2 *Str.* 733. *Stafford v. Clark,* 2 *Bingh.* 380. Thus in covenant to indemnify the plaintiff from all debts due from the late partnership of plaintiff, defendant, and D. B., and from all suits, &c., proof of the proceedings in a foreign court, in a suit there instituted against the late partners, for the recovery of a partnership debt, in which suit a decree passed against them for want of answer, *per quod* a sequestration issued against the plaintiff's estate, and he was obliged to pay the debt, &c., is conclusive against the defendant, who will not be permitted to show that the proceedings were erroneous. *Tarleton v. Tarleton,* 4 *Maule and S.* 20. But if it appears on the face of the foreign proceedings, that the judgment is founded in injustice, as where it appears that the defendant has never been summoned, in which case the court could have no jurisdiction, the judgment will not be conclusive, and the courts here will not give effect to it; *Buchanan v. Rucker,* 9 *East,* 192, 1 *Campb.* 63; *and see Cavan v. Stewart,* 1 *Stark.* 525; but it is otherwise where the proceedings have (according to the law of the foreign country) been served upon a public officer in the absence of the defendant. *Becquet v. MacCarthy,* 2 *B. and Ad.* 954. In order to render the judgment of a foreign court conclusive in this country, it must appear, that it was final and conclusive in the foreign court in which it was given. *Plummer v. Woodburn,* 4 *B. and C.* 637

It seems, that in an action of debt or assumpsit brought in this country upon a foreign judgment, such judgment is to be

considered only as *primâ facie* evidence of the debt, and not conclusive; for it is not relied upon as an estoppel, but as a consideration *primâ facie* sufficient to raise a promise. *Walker v. Witter*, 1 *Dougl.* 1. *Sinclair v. Fraser*, 1 *Dougl.* 5 (*n*), 20 *St. Tr.* 469, *S. C.* *Per Eyre, C J.*, *Phillips v. Hunter*, 2 *H. Bl.* 410. *Per Ld. Mansfield, Herbert v. Cook, Willes*, 37 (*n*), 3 *Dougl.* 101, *S. C.* *Arnott v. Redfern*, 3 *Bingh*, 357. 1 *Phill. Ev.* 332. *Alivon v. Furnival*, 1 *Crom. M. and R.* 277; *but see* 1 *Stark. Ev.* 208, 2 *Evans's Poth.* 311. A judgment in one of the superior courts in Ireland, since the union, is not a record in England, and assumpsit lies upon such judgment here. *Harris v. Saunders*, 4 *B. and C.* 411. Whether the grounds of such a judgment are examinable in an action brought upon it in our courts does not appear to be decided. *See Guinness v. Carroll*, 1 *B. and Ad.* 459. *Martin v. Nicolls*, 3 *Simons*, 458. 1 *Crom. M. and R.* 284. An action will lie upon the decree of a colonial court of equity, for the balance of an account between partners. *Henley v. Soper*, 8 *B. and C.* 16, 2 *M. and R.* 153, *S. C.*

The certificate of a vice-consul has been compared to a foreign judgment, but it will not be admitted as evidence of the facts stated in it. Thus the certificate of a British vice-consul in a foreign country is not admissible to prove the amount of a sale, though by the law of that country he was constituted general agent for all absent owners of goods, and was authorised and compelled to make the sale in question. *Waldron v. Coombe*, 3 *Taunt.* 162.

Effect of Judgments of Inferior Courts.

It seems, upon principle, that the judgment of an inferior court, whether of record or not of record, is conclusive between the same parties upon the same subject matter. *Moses v. Macferlan*, 2 *Burr.* 1009. *Galbraith v. Neville, Dougl.* 6 (*n*). 2 *Evans's Poth.* 303. *Briscoe v. Stephens*, 2 *Bingh.* 216. 1 *Stark. Ev.* 208, 1*st ed.* Though it has been said, that inferior courts, not of record, have not the privilege of not having their judgments controverted. *Per Ld. Mansfield, Walker v. Witter, Dougl.* 3. The judgment of an inferior court may be avoided, by proof that the cause of action did not arise within the jurisdiction of the court. *Herbert v. Cooke*, 3 *Dougl.* 101, *Willes*, 36 (*n*), *S. C.* *Briscoe v. Stephens*, 2 *Bingh.* 213.

So Lord Ellenborough ruled, that the judgment of the Lord Mayor's Court was *primâ facie* evidence that the debt arose within the City; but that being the record of an inferior court the defendant might prove the contrary. *Huxham v. Smith*, 2 *Campb.* 19. So Abbott, C. J., ruled that the judgment of the county court was not conclusive. *Barnes v. Winklar*, 2 *C. and P.* 345. And it has lately been held by the Court of King's Bench, that a judgment of the county court is

examinable, and that the existence of the facts necessary to the regularity of such judgment is a question for the jury, although a motion made in the county court to set aside the proceedings for irregularity had been dismissed. *Thompson v. Blackhurst*, 1 *Nev. and M.* 266.

Where a cause is removed from an inferior court, after a judgment by default, that judgment is not evidence against the defendant in the superior court. *Bottings v. Firby*, 9 *B. and C.* 762.

Effect of Inquisitions, &c.

Effect of coroner's inquest.] Although an inquisition of *felo de se*, taken before the coroner, *super visum corporis*, was formerly considered conclusive evidence of the fact, against the executors or administrators of the deceased; 3 *Inst.* 55; yet it is now held, that such inquisition may be removed into the King's Bench and traversed. 1 *Saund.* 362 (*n*). The finding of *fugam fecit* is, however, still held (though not, as it seems, upon principle) to be conclusive. *Ibid.* By statute 7 and 8 G. 4, c. 64, the jury are not to be required to find whether the prisoner fled.

Effect of an inquisition of lunacy, &c.] An inquisition of lunacy is evidence against third persons, though not conclusive. *Sergeson v. Sealey*, 2 *Atk.* 412. *Faulder v. Silk*, 3 *Campb.* 126.

So an inquisition under a commission from the Court of Exchequer, in the reign of Elizabeth, to inquire whether a prior, or the crown, after the dissolution of the priory, was seised of certain lands, was held to be admissible, but not *conclusive*, evidence of the facts stated in the return. *Tooker v. Duke of Beaufort*, 1 *Burr.* 146. So the surveys of the church and crown lands taken by commissioners, under the authority of parliament, during the commonwealth, are admissible in evidence; and the originals being destroyed in the fire of London, copies of them from unsuspected repositories may be received. *Underhill v. Durham*, 2 *Gwill.* 542. *Bullen v. Michel*, 4 *Dow*, 325. *Roe v. Ireland*, 11 *East*, 284.

The *valor beneficiorum*, or Pope Nicholas's taxation, is a document of the same nature, and is admissible to prove the rate and value at which the persons employed in that taxation thought fit, at that time, to estimate ecclesiastical benefices. *Bullen v. Michel*, 2 *Price*, 477. A new *valor beneficiorum* was made, 26 Hen. 8, by virtue of commissions under the great seal, and the surveys under these commissions are admissible to prove the value of the first fruits and tenths of ecclesiastical promotions at that period, though they are not conclusive on such questions. *Per Richards, C. B., Drake v. Smyth*, 5 *Price*, 377. *Bullen v. Michel*, 4 *Dow*, 324.

Domesday-book, being a work compiled by the authority of the government, is admissible to prove the tenure of the lands then surveyed; and where a question arises whether a manor is ancient demesne, the trial is by inspection of Domesday-book. *Gilb. Ev.* 76.

An inquisition by a sheriff's jury to ascertain the value of property, for the information of the sheriff, is not conclusive, or, as it seems, admissible evidence against the sheriff; *Latkow v. Eamer*, 2 *H. Bl.* 437; nor is it evidence in his favour; *Glossop v. Poole*, 3 *Mau. and S.* 175; unless, perhaps, if the question were whether the sheriff has acted maliciously. *Per Ld. Ellenborough*, *id.* 177.

Effect of Convictions, Sentences, &c.

It is a general rule, that where justices of the peace have an authority given to them by act of parliament, and they appear to have acted within the jurisdiction so given, and to have done all that they are required by the act to do, in order to originate their jurisdiction, a conviction drawn up in due form, and remaining in force, is a protection in any action brought against them for the act so done. *Per Abbott, C. J.*, *Basten v. Carew*, 3 *B. and C.* 653. Therefore, where, in trespass against two magistrates for giving the plaintiff's landlord possession of a farm, as a deserted farm, the defendants produced in evidence a record of their proceedings, under the statute 11 Geo. 2, c. 19, s. 16, which set forth all such circumstances as were necessary to give them jurisdiction, and by which it appeared, that they had pursued the directions of the statute, it was held that this record was not traversable, and was a conclusive answer to the action. *Ibid.* So in trespass against magistrates, for taking and detaining a vessel, a conviction by them, under the bum-boat act, is conclusive evidence that the vessel in question is a boat within the meaning of the act, and properly condemned. *Brittain v. Kinnaird*, 1 *B. and B.* 432; *and see Wickes v. Clutterbuck*, 2 *Bingh.* 486; *Rogers v. Jones*, 3 *B. and C.* 409; *Fawcett v. Fowlis*, 7 *B. and C.* 394; 1 *B. and Ad.* 386 (*n*). *Meller v. Baddeley*, 6 *C. and P.* 374.

Upon the same principle which makes a conviction conclusive, it has been held, that a certificate from commissioners under the act for settling the debts of the army, stating the sum due from the defendant to the plaintiff, is conclusive in an action brought to recover the money. *Moody v. Thurston*, 1 *Str.* 481. *See Att. Gen. v. Davison*, 1 *M'Cl. and Y.* 160. In like manner a conviction for a contempt by commissioners of a court of requests is conclusive with regard to the facts stated therein. *Aldridge v. Haines*, 2 *B. and Ad.* 395.

So the sentence of expulsion of a member of a college by the master and fellows, is conclusive evidence of that fact, and cannot be impeached in a court of law. *R. v. Grundon*,

Cowp. 315. So a sentence of deprivation by a visitor of a college, is in the same manner conclusive. *Philips v. Bury,* 1 *Ld. Raym.* 5; 2 *T. R.* 346, *S. C.; see Harg. Law Tracts*, 464, 465. So also in ejectment against a schoolmaster who had been removed by sentence of the trustees of the school (such power being vested in them) for misbehaviour, it was held that it was not necessary for the lessors of the plaintiff to prove the grounds of the sentence, and that it was not competent for the defendant to disprove them. *Doe v. Haddon*, 3 *Dougl.* 310.

Effect of Court Rolls.

Court rolls, whether of the court baron or customary court, are evidence between the lord of the manor and his tenants or copyholders, *B. N. P.* 247. 1 *Phill. Ev.* 397, and ancient writings not properly court rolls, nor signed by any of the tenants, but found among the rolls, and delivered down from steward to steward, purporting to have been made *assensu omnium tenentium*, have been admitted as evidence to prove the course of descent within a manor. *Denn v. Spray*, 1 *T. R.* 466. So an entry on the court rolls of a manor, stating the mode of descent of lands in the manor, is evidence of such mode, though no instance of any person having taken according to it be proved. *Roe v. Parker*, 5 *T. R.* 26; *and see Doe v. Askew*, 10 *East*, 520. So in an action by a copyholder against the freeholder of a manor, certain parchment writings preserved among the muniments of a manor, dated in 1698 and 1717, purporting to be signed by certain copyholders of the manor, stating an unlimited right of common in the copyholders, were held to be evidence of the reputation of the manor at the time, as to a prescriptive right of common set up by the defendant. *Chapman v. Cowlan*, 13 *East*, 10. Presentments are not evidence of matters not within the jurisdiction of the homage. *Richards v. Bassett*, 10 *B. and C.* 657.

Effect of Bishop's Certificate.

In certain cases involving matter of law as well as matter of fact, *see Omichund v. Barker, Willes*, 549, the certificate of the bishop is conclusive evidence. Thus where issue was joined upon the record in certain real writs, upon the legality of a marriage, or its immediate consequence "general bastardy," or in like manner in some other particular instances lying peculiarly within the knowledge of the spiritual courts, as profession, deprivation, and some others, in these cases upon the issue so joined, the mode of trying the question is by reference to the ordinary, and his certificate when returned, received and entered upon the record, in the temporal courts, is a perpetual and conclusive evidence against all the world on that point. *Per de Grey, C. J., Duch. of King-*

ston's case, 20 *How. St. Tr.* 339; *and see Com. Dig. Certificate.* In bastardy the trial by the certificate of the bishop takes place at this day only in the case of a general allegation of bastardy, and that only so long as the party is living, and not only living, but a party to the suit, and not only a party to the suit, but adult; in matrimony, in the two cases only of dower and appeal. *Per Ld. Loughborough, Ilderton v. Ilderton*, 2 *H. Bl.* 156.

Effect of State Documents, &c.

Acts of Parliament.] The preamble of a public act of parliament reciting the existence of certain outrages, is evidence to prove that fact, because in judgment of law every subject is privy to the making of it. *R. v. Sutton*, 4 *M. and S.* 532.

Proclamations.] The King's proclamation being an act of state, of which all ought to take notice, *per Treby, C. J., Wells v. Williams*, 1 *Ld. Raym.* 283, is evidence to prove a fact recited in it, *viz.* that certain outrages had been committed in different parts of certain counties. *R. v. Sutton*, 4 *Mau. and S.* 532.

Journals of Parliament.] The Journal of the House of Lords containing an address of the Lords to the King, and the King's answer, in which certain differences are stated to exist between the King of England, and the King of Spain, is admissible to prove the fact of such differences existing. *R. v. Franklin*, 17 *How. St. Tr.* 637. *R. v. Holt*, 5 *T. R.* 445. But the resolutions of either House of Parliament are not evidence of facts therein stated; thus the resolution of the House of Commons, stating the existence of the Popish plot, was held to be no evidence of that fact. *Oates's case*, 10 *How. St. Tr.* 1165, 1167.

Gazette.] The gazette is evidence of all acts of state there included: as where it states that certain addresses have been presented to the King, it is evidence to prove that fact. *R. v. Holt*, 5 *T. R.* 436. So proclamations, there printed, may be proved by production of the gazette. *Ibid.* 443, *Attorn. Gen. v. Theakestone*, 8 *Price*, 89. But the gazette is not evidence of matters therein contained, which have no reference to acts of state, as a grant by the King to a subject of a tract of land, or of a presentation; *See R. v. Holt*, 5 *T. R.* 443; or of the appointment of an officer to a commission in the army. *Kirwan v. Cockburn*, 5 *Esp.* 233. *R. v. Gardner*, 2 *Campb.* 513. It is usual to insert advertisements of the dissolution of partnerships in the gazette, but it seems that unless the party to be affected by the notice be proved to be in the habit of reading the gazette, it will not be evidence of such notice. *Graham v. Hope*, *Peake*, 154; *Godfrey v. Macauley*, *ibid.* 155

(*n*); *but see S. C.* 1 *Esp.* 371, *differently reported*; *and see Newsome v. Coles*, 2 *Campb.* 617; *and Gorham v. Thompson, Peake*, 42. Lord Ellenborough in one case admitted the gazette as evidence, but observed, that unless it were proved that the party were in the habit of reading it, the evidence would be of little avail. *Leeson v. Holt*, 1 *Stark.* 186; *see also Munn v. Baker*, 2 *Stark.* 255. It seems not to be necessary, in giving the gazette in evidence, to prove that it was bought of the gazette printer, or where it came from. *Forsyth's case, Russ. and Ry. C. C. R.* 274.

A paper from the secretary of state's office, transmitted by the British Ambassador at a foreign court, and purporting to be a declaration of war by the government of that country against another foreign state, is admissible for the purpose of showing the precise period of the commencement of the war. *Thelluson v. Cosling*, 4 *Esp.* 266. The articles of war printed by the King's printer, are evidence of such articles, *R. v. Withers, cited* 5 *T. R.* 446, of which it seems the court will take judicial notice. *Bradley v. Arthur*, 4 *B. and C.* 304.

Effect of Public Books, &c.

Public books and documents are, in many instances, evidence of the facts there recorded. Thus the register of the Navy Office, with proof of the usage to return all persons dead, is evidence to prove the death of a sailor. *B. N. P.* 249. The book at Lloyd's, stating the capture of a ship, is evidence of such capture; but it is not evidence of notice of the loss, unless to a person who is a subscriber at Lloyd's and in the habit of examining the books there. *Abel v. Potts*, 3 *Esp.* 242. The log-book of a man-of-war is evidence to prove the time of that vessel sailing as convoy, in an action on the insurance of another vessel. *D'Israeli v. Jewett*, 1 *Esp.* 427. The bank books are evidence to prove a transfer of stock. *Breton v. Cope, Peake*, 30. So the book from the master's office in K. B. to prove a person an attorney of that court, without production of the roll. *R. v. Crossley*, 2 *Esp.* 524. So the poll books at an election. *Mead v. Robinson, Willes*, 424. So the books of the King's Bench and Fleet prisons are admissible to prove the dates of the commitment and discharge of prisoners; *R. v. Aickles, Leach, C. L.* 436; but not the *cause* of commitment, of which the commitment itself is the best evidence. *Salte v. Thomas*, 3 *B. and P.* 188. The copy of an official paper, containing the number of passengers on board a vessel, made by the captain, in pursuance of an act of parliament, and deposited at the India House, is admissible to show the number and description of the persons on board the vessels. *Richardson v. Mellish, R. and M.* 66, 2 *Bingh.* 229, *S. C.* Excise books, transcribed from the master's specimen paper, are evidence against him, without calling the officers who have transcribed

them, as it is said, *ex necessitate rei*. *R. v. Grimwood*, 1 *Price*, 369. Entries in the books of the clerk of the peace, of deputations many years since granted to gamekeepers by the owner of a manor, are evidence, without production of the deputations themselves, to show that the party there mentioned exercised the right of appointing gamekeepers by applying to the clerk of the peace to get certificates. *Hunt v. Andrews*, 3 *B. and A.* 341; *see Rushworth v. Craven*, 1 *M'Cl. and Y.* 417. Returns of sales of corn under 1 and 2 Geo. 4, c. 87, are not conclusive evidence to show the parties to whom the corn was delivered. *Woodley v. Brown*, 2 *Bingh.* 527. An entry in a vestry book, stating that A. was duly elected treasurer of the parish, at a vestry duly held in pursuance of notice, is evidence of such election. *R. v. Martin*, 2 *Campb.* 100. So a wardmote book, to prove the election of a constable in the city of London. *Underhill v. Witts*, 3 *Esp.* 56. So, in an action for disturbing the plaintiff in the enjoyment of a pew, claimed in right of his messuage, an old entry in the vestry book signed by the churchwardens, stating repairs of the pew, by a former owner of the messuage (under whom the plaintiff claims), in consideration of his using it, is evidence to prove the plaintiff's title, for it is made by the churchwardens on a subject within the scope of their official authority. *Price v. Littlewood*, 3 *Campb.* 288. By the statute 17 Geo. 2, c. 38, s. 14, true copies of all rates and assessments made for the relief of the poor are to be entered in a book provided for that purpose, by the churchwardens and overseers of every parish; and by the statute 42 Geo. 3, c. 46, the particulars of parish indentures are directed to be entered in a book, which book shall be deemed sufficient evidence in courts of law of the existence and particulars of such indentures, in case it shall be proved that the originals are lost or destroyed. Corporation books are evidence between members and the corporation, but they are not evidence in favour of the corporation against a stranger; *Mayor of London v. Mayor of Lynn*, 1 *H. Bl.* 214 (*n*). *Marriage v. Lawrence*, 3 *B. and A.* 142; unless the entry be of a public nature. *Per Abbott, C. J., ibid. R. v. Mothersell*, 1 *Str.* 93. In an action by a corporation for tolls, entries in their own books are not admissible for them. *Brett v. Beales*, *M. and M.* 429. Rolls or ancient books in the heralds' office, are evidence to prove a pedigree, but an extract of a pedigree, proved to be taken out of records, is not, because such extract is not the best evidence, as a copy of such records might be had. *B. N. P.* 248. *King v. Foster*, *Sir T. Jones*, 224. The heralds' visitation books of counties are also evidence on a question of pedigree. *Pitton v. Walter*, 1 *Str.* 162; *see Vin. Ab. Ev.* (*A. b.* 39.) A general history may be given in evidence to prove a matter relating to the kingdom in general; *B. N. P.* 248; *Vin. Ab. Ev.* (*A. b.* 46); thus chronicles

have been admitted to prove, that at a certain period King Philip had not assumed the style given him in a deed. *Neale v. Fry, cited* 1 *Salk.* 282. So Speed's Chronicle was admitted as evidence of the death of Edward the Second's queen. *Brounker v. Atkins, Skin.* 14. But a general history is not evidence to prove a particular custom. *B. N. P.* 248. Thus Camden's Britannia was held to be no evidence on an issue whether by the custom of Droitwich, salt pits could be sunk in any part of the town. *Stainer v. Burgesses of Droitwich,* 1 *Salk.* 282. In a late case, Bishop Wells's *Liber de Ordinationibus Vicariorum* was received in evidence to prove a vicar's endowment. *Tucker v. Wilkins,* 4 *Simons,* 262. By the same principle under which entries in public books are admitted to prove the facts there stated, it has been held that the post-office marks, in town or country, proved to be such, are evidence that the letters, on which they are impressed, were in the office to which those marks belong, at the dates those marks specify. *Plumer's case, Russ. and Ry. C.C.R.* 264; *and see Fletcher v. Braddyll,* 3 *Stark.* 64. *Arcangelo v. Thompson,* 2 *Campb.* 623. *Cotton v. James, M. and M.* 276.

An almanack is good evidence to prove that a particular day was Sunday. *Page v. Faucet, Cro. Eliz.* 227.

Effect of Public Registers.

The registers of christenings, marriages, and burials, preserved in churches, or copies of them, are good evidence, *B. N. P.* 247. Where it appeared, that the practice was to make entries in the general parish register once in three months, out of a day-book, in which the entries were made immediately after the christening, or on the same morning; and in the day-book, after a particular entry, the letters B. B. (signifying base born,) were inserted, which were omitted in the register, it was held that evidence of the day-book could not be received, for that there could not be two parish registers. *May v. May,* 2 *Str.* 1073. The register is no evidence of the identity of the parties. *Birt v. Barlow. Dougl,* 170; *ante p.* 80. The books of the Fleet prison are not, as it seems, evidence to prove a marriage, for they are not made by public authority. *Rejected by Ld. Kenyon, Read v. Passer, Peake,* 232, 1 *Esp.* 213, *S. C. By De Grey, C. J., Howard v. Burtonwood, Peake,* 233 (*n*). *By Lord Hardwicke and Lee, C. J., ibid. By Le Blanc, J., Cooke v. Lloyd, Peake, Ev. App.* 78. *By Burrough, J., Doe v. Passingham, MS. Shrews. Sum. Ass.,* 1826. *Said to have been admitted by Heath, J., Doe dem. Passingham v. Lloyd, Shrews. Sum. Ass.* 1794, *Peake,* 231; *and see Doe v. Madox,* 1 *Esp.* 197. *Lloyd v. Passingham,* 16 *Ves.* 59. It seems, however, that declarations, by the parties, that they have been married at the Fleet, are evidence of a marriage. *Lawrance v. Dixon, Peake,* 136. *Reed v. Passer, id.* 232. The copy of a register of a

foreign chapel is not admissible in our courts to prove a marriage abroad; *Leader v. Barry*, 1 *Esp.* 353; nor of a dissenting chapel, since it is not a public document. *Newham v. Raithby*, 1 *Phillimore*, 315. So a copy of a register of baptism kept in the island of Guernsey, is not admissible. *Huet v. Le Mesurier*, 1 *Cox's Ca.* 275.

An entry in a register of baptism, as to the time of a child's birth, is not evidence of the age. *Wihen v. Law*, 3 *Stark.* 63. *R. v. Clapham*, 4 *C. and P.* 29. Nor is the register of the christening of a child in a particular parish evidence, when unaccompanied by other circumstances, that the child was born in that parish. *R. v. North Petherton*, 5 *B. and C.* 508. Where a register of baptism stated that the child was illegitimate, Alderson, J., admitted it as proof of that fact, observing that similar evidence had been admitted in a case of Morris v. Davies. *Cope v. Cope*, 1 *Moo. and Rob.* 269, 5 *C. and P.* 604, *S. C.* And Lord Denman, C. J., admitted a registry of *marriage* as evidence between strangers of the *time* of the marriage. *Doe dem. Wollaston v. Barnes*, 1 *Moo. and Rob.* 386. An entry, by a minister, of a baptism which took place before he became minister, and of which he received information from the parish clerk, is not admissible, nor is the private memorandum of the fact, made by the clerk who was present at the baptism. *Doe v. Bray*, 8 *B. and C.* 813. It seems that a bishop's register is evidence of the facts stated in it. *Arnold v. Bishop of Bath and Wells*, 5 *Bingh.* 316.

Effect of Awards.

An award, regularly made by an arbitrator to whom matters in difference are referred, is conclusive in an action at law on the parties to the reference, upon all matters inquired into within the submission. 1 *Phill. Ev.* 360; *and see Campbell v. Twemlow*, 1 *Price*, 81; *Dunn v. Murray*, 9 *B. and C.* 780. Thus where a covenantor and covenantee submitted the amount of damages on a breach of covenant to arbitration, the award, unimpeached, was held conclusive. *Whitehead v. Tattersall*, 1 *Ad. and Ell.* 491. So where in an action of ejectment it appeared that the lessor of the plaintiff and the defendant had before referred their right to the land to an arbitrator, who had awarded in favour of the lessor, it was held, that the award concluded the defendant from disputing the lessor's title. *Doe v. Rosser*, 3 *East*, 11; *see Chamb. Landl. and Ten.* 267. But where, on a reference by landlord and tenant, the arbitrator awarded, that a stack of hay left upon the premises by the tenant, should be delivered up by him to the landlord, upon the tenant being paid a certain sum, it was held, that the *property* in the hay did not pass to the landlord, on his tender of the money, by mere force of the award, against the consent of the tenant, who refused to accept the money or deliver up the hay. *Hunter v. Rice*, 15 *East*, 100. Where the commis-

sioners under an inclosure act were directed to make an award respecting the boundaries of a parish, and to advertise a description of the boundaries so fixed, and the boundaries so fixed were to be inserted in their award, and to be binding, final, and conclusive, but the boundaries mentioned in the award varied from those which had been advertised, it was held, that the commissioners not having pursued their authority, their award was not binding as to the boundaries. *R. v. Washbrook*, 4 *B. and C.* 732. An award made on a reference of all matters in difference between the parties, will not be a bar with regard to any demand which was not in difference between them at the time of the submission, nor referred by them to the arbitrators. *Ravee v. Farmer*, 4 *T. R.* 146. *Smith v. Johnson*, 15 *East*, 213. *See Thorpe v. Cooper*, 5 *Bingh.* 129.

Where no arbitration bonds had been entered into, but the arbitrators made an award, Eyre, C. J., admitted the award as evidence under the account stated; *Keen v. Batshore*, 1 *Esp.* 194; and in assumpsit on a policy of insurance, Lord Kenyon admitted evidence that the defendant had agreed to be bound by an award to which other persons were parties, and that the award was in favour of the plaintiff. *Kingston v. Phelps*, *Peake*, 228.

As to the effect of *Presumptive Evidence, Hearsay, and Admissions*, see those titles respectively.

STAMPS.

Effect of want of stamp.] An instrument, requiring a stamp, cannot be produced in evidence without being stamped, and if parties agree by parol to be bound by the same terms as those contained in another written instrument, the latter cannot be given in evidence unless properly stamped. *Turner v. Power*, 7 *B. and C.* 625. *See Drant v. Brown*, 3 *B. and C.* 665. When an unstamped instrument in writing has been lost, *R. v. Castlemorton*, 3 *B. and A.* 588, or destroyed even by the party who objects to the want of the stamp, *Rippiner v. Wright*, 2 *B. and A.* 478, parol evidence of the contents is inadmissible. But in some cases, in which an instrument has been lost, which is not proved to have been properly stamped, that fact may be presumed, as where an indenture of apprenticeship, executed thirty years before, was lost, it was presumed to have been properly stamped, though an officer from the stamp-office proved that it did not appear that any such indenture had been stamped. *R. v. Long Buckby*, 7 *East*, 45. And where a party refuses to produce an agreement after notice, it will be presumed, as against him, to be properly

stamped. *Crisp v. Anderson*, 1 *Stark.* 35. Where the transaction is capable of being legally proved by other evidence than that of the instrument which ought to bear a stamp, such evidence may be resorted to. Thus, where a promissory note appears to be improperly stamped, the plaintiff may resort to the original consideration. *Farr v. Price*, 1 *East*, 58. *Tyte v. Jones, id.* (*n*). So, though an unstamped receipt is no evidence of payment, the fact of payment may be proved by a witness who was present. *Rambert v. Cohen*, 4 *Esp.* 213. So where an action is brought upon an instrument which ought to be stamped, and the form of the pleading is such, that at the trial it is not necessary to produce the instrument, a court of law will not examine whether the instrument is legally available with reference to the stamp laws. *Per Lord Eldon, Huddlestone v. Briscoe*, 11 *Ves.* 596. *Thynne v. Protheroe*, 2 *Mau. and S.* 553. Where a bill of exchange on a wrong stamp has been given for goods sold, the vendor in suing for the price need not prove notice of dishonour. *Cundy v. Marriott*, 1 *B. and Ad.* 696. If a plaintiff succeeds in making out a case of implied or oral contract, and it does not appear on the cross-examination of his witnesses that there was any contract in writing, the defendant will not be allowed to give an unstamped written contract in evidence for the purpose of nonsuiting the plaintiff. *Fielder v. Ray*, 6 *Bingh.* 332; *and see Reed v. Deere*, 7 *B. and C.* 266. *R. v. Inhab. of Rawden*, 8 *B. and C.* 708. A party who executes the counterpart of a deed, properly stamped, cannot object to its admissibility in evidence, on the ground that the original is not properly stamped. *Paul v. Meek*, 2 *Y. and J.* 116, *ante p.* 2.

Unstamped instrument, when evidence for collateral purposes.] In many cases an instrument, not legally stamped, is admissible to prove a collateral fact. Thus, in an action of debt, for bribery at an election, an unstamped promissory note payable to the defendant, which the witness said he had given for the repayment of money received by him, as a voter, from the defendant, is evidence to corroborate the testimony of the witness. *Dover v. Maestaer*, 5 *Esp.* 92. So an unstamped agreement has been admitted between the parties to prove usury. *Nash v. Duncomb*, 1 *Moo. and Rob.* 104. So to refresh a witness's memory, *ante p.* 124. So an unstamped promissory note may be given in evidence to establish fraud, by showing that it was written by the maker in a state of intoxication. *Gregory v. Fraser*, 3 *Camph.* 454. And the court may inspect an unstamped writing for the purpose of ascertaining whether its contents preclude the admission of parol evidence. *R. v. Pendleton*, 15 *East*, 449. But such an instrument cannot *be read to the jury* as evidence of the contract, or any part of it, in respect of which the plaintiff sues. *Jardine v. Payne*, 1 *B. and*

Ad. 670. Where a party declared upon two written agreements, by the second of which variations were made in the first, and there were also counts upon each separately, and it appeared, when the instruments were produced in evidence by the plaintiff, that the first only was stamped, it was held that the second could not be read in evidence to support the plaintiff's case, but might be looked at by the court in order to ascertain whether the first was altered by it, and that therefore the plaintiff could not exclude the second agreement, and proceed upon the counts setting out the first only. *Reed v. Deere*, 7 *B. and C.* 261. Where, in an action against an acceptor it appeared that on the bill becoming due his name had been erased and another bill (unstamped) drawn on the back of the first, it was held that the unstamped bill could not be submitted to the jury for the purpose of drawing the conclusion that the first bill had been cancelled. *Sweeting v. Halse*, 9 *B. and C.* 365 ; *and see Sutton v. Toomer*, 7 *B. and C.* 416.

Several stamps, several contracts with one stamp, and number of words.] Where the subject matter of the instrument is joint, though several persons are interested in it, only one stamp is requisite. Thus, an assignment of the prize-money of several seamen on board a privateer, payable out of one fund, requires only one stamp. *Baker v. Jardine*, 13 *East*, 235 (*n*). So an agreement by several for a subscription for one common fund. *Davis v. Williams*, 13 *East*, 232. So an agreement of reference by all the underwriters on one policy. *Goodson v. Forbes*, 6 *Taunt.* 171. So a bond by several obligors, in a penalty conditioned for the performance of certain acts, by each and every of them. *Bowen v. Ashley*, 1 *N. R.* 274; 6 *Taunt.* 175; *and see Stead v. Liddard*, 1 *Bingh.* 196. *Boase v. Jackson*, 3 *B. and B.* 185. And where the members of a mutual insurance club all executed the same power of attorney, severally authorising the persons therein named to sign the club policies for them, it was held to require only one stamp. *Allen v. Morrison*, 8 *B. and C.* 565. Whether a release to two witnesses, with one stamp only, is good, appears to be doubtful. *Spicer v. Burgess*, 1 *Crom. M. and R.* 129. 4 *Tyr.* 598, *S. C.*

Where an agreement refers to another document, and the two papers form, in fact, but one agreement, it is sufficient if one of them only bear a stamp. *Peate v. Dicken*, 1 *Crom. M. and R.* 422. But where a paper contains several contracts, and consequently requires several stamps, but only one is impressed upon it, that stamp applies to the contract only on which it is impressed. *Powell v. Edmunds*, 12 *East*, 6. And where an instrument contains a contract of demise, general in its terms, but several in its operation with respect to the different tenants who sign, it is matter of evidence to which

contract the stamp applies, and the juxta-position of the stamp is to be regarded. *Doe v. Day*, 13 *East*, 241. Where the several admissions of five corporators as freemen were written on the same paper, with only one stamp, such stamp was held to apply to the first admission only, and the others could not be read. *R. v. Reeks*, 2 *Ld. Raym.* 1445; *and see Perry v. Bouchier*, 4 *Campb.* 80; *Waddington v. Francis*, 5 *Esp.* 182.

The defendant executed a release to one of his witnesses in the usual manner, and gave it to his attorney. At the trial, it appeared that another witness would require to be released. His name was accordingly inserted in the release, and the defendant re-executed it, before it had been delivered to either witness; it was held, that this re-execution did not make a fresh stamp necessary. *Spicer v. Burgess*, 1 *Crom. M. and R.* 129, 4 *Tyr.* 598, *S. C.*

The stamp on an agreement, which incorporates by reference a clause in a former one, is properly regulated by the quantity of words in the second agreement *not* including the clause referred to. *Attwood v. Small*, 7 *B. and C.* 390. Where an agreement, and a writing described therein as annexed to it, contain together more than 1080 words, a 35*s.* stamp is required, although in fact the writing was annexed to the agreement after it was executed. *Veal v. Nicholls*, 1 *M. and Rob.* 248. Signatures must be counted, and where there is a joint agreement to be responsible for costs in certain amounts, all the names and sums must be read to ascertain the amount, for which the party in question is liable, and those names and sums must be counted. *Linley v. Clarkson*, 1 *Crom. and M.* 437.

Proper denomination.] By statute 43 Geo. 3, c. 127, s. 6, if the stamp is of a proper denomination it shall not be ineffectual from its being of a greater value than the stamp acts require, and by statute 55 Geo. 3, c. 184, s. 10, all instruments for, or upon which any stamp or stamps shall have been used, of an improper denomination, or rate of duty, but of equal or greater value, in the whole, with or than the stamp or stamps which ought regularly to have been used thereon, shall be deemed valid and effectual in law, except in cases where the stamp or stamps, used in such instruments, shall have been specifically appropriated to any other instrument by having its name on the face thereof.

If an instrument bear a proper stamp when produced at the trial it is sufficient, though it was not stamped when it was executed, provided the commissioners of stamps are not expressly prohibited from subsequently affixing a stamp. *R. v. Bishop of Chester*, 1 *Str.* 624; *and see Rogers v. James*, 7 *Taunt.* 147. The court will not inquire whether the penalty has been paid, or whether the stamp has been affixed in proper time, but will receive the instrument in evidence, though with

regard to *its effect* they will inquire into the time, when a period is limited by statute. *R. v. Preston*, 3 *Nev. and M.* 31. *R. v. Tomblinson*, 3 *Dowl. P. C.* 49. And with regard to an instrument to which a stamp cannot be subsequently affixed, an inquiry as to the time when the stamp was put on is admissible. *Green v. Davies*, 4 *B. and C.* 241; *but see Wright v. Riley*, *Peake*, 173.

Where an instrument has been stamped on payment of a penalty it is admissible, though the receipt has been erased, provided it be proved that such receipt was once indorsed. It is not necessary to prove the commissioners' signature to the receipt. *Apothecaries' Company v. Fernyhough*, 2 *C. and P.* 439; *but see* 3 *Nev. and M.* 31.

Administration, Letters of.

Where an administrator is bound to prove his title at the trial, and produces letters of administration stamped for a less sum than that which he seeks to recover in the action, it is ground of non-suit. *Hunt v. Stevens*, 3 *Taunt.* 113. *Carr v. Roberts*, 2 *B. and Ad.* 905. On payment of the full duty, such letters may be restamped with the proper stamp. 55 Geo. 3, c. 184, s. 41. But where an administrator is not bound to prove his title, as where he sues on promises to his intestate, and *non assumpsit* is pleaded, the defendant cannot insist on the plaintiff proving his title, by producing the letters of administration, and if produced, cannot object that they are not properly stamped. *Thynne v. Protheroe*, 2 *Mau. and S.* 553.

Agreements.

By 55 Geo. 3, c. 184, sched. an agreement, or any minute, or memorandum of an agreement, made in England, under hand only, or made in Scotland, without any clause of registration, and not otherwise charged in that schedule to that act, nor expressly exempted from all stamp duty, where the matter thereof shall be of the value of 20*l.* or upwards, whether the same shall be only evidence of a contract, or obligatory upon the parties, from its being a written instrument, together with every schedule, receipt, or other matter put or indorsed thereon or annexed thereto, shall bear a 1*l.* stamp. *See similar provisions in* 44 *Geo.* 3, *c.* 98, 48 *Geo.* 3, *c.* 149, *upon which many of the cases cited below arose.*

The following are the exemptions in the schedule :—

First Exemption. Label, slip, or memorandum, containing the heads of insurances to be made by the corporations of the Royal Exchange Assurance, or London Assurance, or by the corporations of the Royal Exchange Assurance of houses and goods from fire, and London Assurance of houses and goods from fire.

Second Exemption. Memorandum or agreement for granting a lease or tack, at rack rent, of any messuage, land, or tenement, under the yearly rent of 5*l.* An agreement for a building lease, though under 5*l.* per annum, is not within this exemption, the interest being a beneficial one. *Doe v. Boulcot*, 2 *Esp.* 595.

Third Exemption. Memorandum or agreement for the hire of any labourer, artificer, manufacturer, or menial servant. The assignment of an apprentice is not within this exemption. *R. v. St. Paul's, Bedford*, 6 *T. R.* 452.

Fourth Exemption. Memorandum, letter, or agreement made for or relating to the sale of any goods, wares, or merchandises.

Cases within the Fourth Exemption. An undertaking to guarantee the payment of goods, to be furnished to third persons. *Warrington v. Furbor*, 8 *East*, 542. An agreement by A. to take half of certain goods bought by B. on their joint account, and to furnish B. with half the amount in time for payment. *Venning v. Leckie*, 13 *East*, 7. An agreement to cancel a former agreement relative to the sale of goods, and for the future sale of goods, upon different terms. *Whitworth v. Crockett*, 2 *Stark.* 431. An agreement for the sale of rape oil, not yet expressed from the seed. *Wilks v. Atkinson*, 6 *Taunt.* 11; *but see Buxton v. Bedall*, 3 *East*, 303. An agreement for the sale of chimney-pieces, the vendor "to finish them in a tradesman-like manner." *Hughes v. Breeds*, 2 *Car. and P.* 159. A receipt for the price of a horse containing a warranty of soundness. *Skrine v. Elmore*, 2 *Camph.* 407. An agreement for a crop growing in a close, to be removed immediately, and conferring no interest in the land. *Parker v. Staniland*, 11 *East*, 362. *Warwick v. Bruce*, 2 *M. and S.* 205. *Evans v. Roberts*, 5 *B. and C.* 829. *Watts v. Friend*, 10 *B. and C.* 446. *See Earl of Falmouth v. Thomas*, 1 *C. and M.* 89. An agreement for the purchase of *timber*, though the trees are growing. *Smith v. Surman*, 9 *B. and C.* 561. An agreement to supply a house with water. *West Middlesex W. W. v. Suwerkropp*, *M. and M.* 408. Some of the above cases were decided on the 4th section of the statute of frauds, but they apply as authorities on the stamp act also.

Cases not within the Fourth Exemption. An agreement *in fieri* for the making of goods, and for work and labour to be done, as for putting up certain machines. *Buxton v. Bedall*, 3 *East*, 303; *but see Wilks v. Atkinson*, 6 *Taunt.* 11; *Hughes v. Breeds*, 2 *Carr. and P.* 159, *supra*; *see also Waddington v. Bristow*, 2 *B. and P.* 455. An agreement by a principal to provide for certain bills drawn upon his factor, if certain goods, then either in the factor's possession or about to be placed there, should remain unsold at the time of the bills falling due; for the exemption is confined to instruments whereof the

sale of goods is the primary object. *Smith v. Cator*, 2 *B. and A.* 778. An agreement for the sale of growing crops, conferring an interest in the land. *Crosby v. Wadsworth*, 6 *East*, 602 (*case on the 4th sec. of the statute of frauds*). *Waddington v. Bristow*, 2 *B. and P.* 453. *Emmerson v. Heelis*, 2 *Taunt.* 38 (*case on the 4th sec. of the statute of frauds*). So a sale of growing underwood, to be cut by the purchaser, has been held to confer an interest in land under the 4th section of the statute of frauds. *Scorell v. Boxall*, 1 *Y. and J.* 396. A contract, under seal, for the sale of goods. *Per Bayley, J., Clayton v. Burtenshaw*, 5 *B. and C.* 45.

Fifth Exemption. Memorandum or agreement made between the master and mariners of any ship or vessel, for wages on any voyage coastwise from port to port, in Great Britain, *see* 3 *and* 4 *W.* 4, *c.* 19, *post, p.* 149.

Sixth Exemption. Letters containing any agreement (not before exempted), in respect of any merchandise, or evidence of such an agreement, which shall pass by the post between merchants and other persons carrying on trade or commerce in Great Britain, and residing, and actually being, at the time of sending such letters, at the distance of fifty miles from each other.

A letter by a son who managed his mother's business, to a creditor of his mother, residing above fifty miles from him, containing a promise to pay the debt of the mother, is within this exemption. *Mackenzie v. Banks*, 5 *T. R.* 176.

The statute only requires an agreement to be stamped when the matter thereof shall be of the value of 20*l.*, or upwards. It therefore only applies when the value of the contract is measurable; thus a contract of marriage may be proved by unstamped letters. *Orford v. Cole*, 2 *Stark.* 351. And a memorandum, by a wharfinger, of the receipt of goods, to be shipped in a particular manner, may be given in evidence to show the terms upon which they were received, without a stamp, the value of the goods being above 20*l.*, but the wharfage being of less amount. *Chadwick v. Sills*, *R. and M.* 15. But an agreement to indemnify A. from all costs, charges, damages, or other expenses, which he may incur as bail for B. requires an agreement stamp, the arrest of B. being for more than 20*l.*, though the costs, &c. incurred do not amount to that sum. *Williams v. Jarrett*, 5 *B. and Ad.* 32, 2 *Nev. and M.* 249, *S. C.* A written paper, delivered by the auctioneer to the bidder, to whom lands were let by auction, containing the description of the lands, the terms for which they were let to the bidder, and the rent payable, but not signed by the auctioneer, or any of the parties, was held not to require a stamp, nor to exclude parol evidence, since it was collateral to the taking, and was no more than if the auctioneer had told the defendant on what terms he was to hold. *Ramsbottom v. Tunbridge*,

2 *Maule and S.* 434. So a proposal from A. to B. to let to B. a piece of land, on the terms contained in a written agreement between B. and C., A. afterwards agreeing that B. should have the land on the terms proposed, does not require a stamp. *Drant v. Brown*, 5 *D. and R.* 582, 3 *B. and C.* 665, *S. C.* *Hawkins v. Warre*, 3 *B. and C.* 690. So a mere order for goods does not require a stamp; *Ingram v. Lea*, 2 *Campb.* 521; but a written paper signed by an auctioneer, and delivered to the bidder, to whom lands were let by auction, containing the terms of the letting, and the rent payable, must be stamped. *Ramsbottom v. Mortley*, 2 *Maule and S.* 445.

In an action against an attorney, the plaintiff gave in evidence the following unstamped letter: "I have this day received a bill of exchange for 50*l.* (describing it), which I hold as your attorney, to recover the value on from the respective parties, or to make such other arrangement for your benefit as may appear to me in my professional capacity reasonable and proper." It was held that this letter was not evidence of a contract, but a mere acknowledgment of the duty which the party took upon himself to perform, and that it therefore required no stamp. *Langdon v. Wilson*, 7 *B. and C.* 640 (*n*). *Mullett v. Huchinson*, 7 *B. and C.* 639, 1 *M. and R.* 522, *S. C.*

By the 5 & 6 W. 4, c. 19, s. 35, all agreements with the crew of a ship made in pursuance of, and in conformity with that act, and all indentures of parish and voluntary apprentices to the sea service, and all counterparts and assignments of such indentures, executed after the passing of the act, are exempted from stamp duty.

Appraisements.

By 55 Geo. 3, c. 184, schedule, part 1, appraisement or valuation of any estate or effects, real or personal, heritable or moveable, or of any interest therein, or of the annual value thereof, or of any dilapidations, or of any repairs wanted, or of the materials or labour used, or to be used, in any buildings, or of any artificer's work whatsoever, must be stamped, where the amount of appraisement does not exceed 50*l.*—2*s.* 6*d.*, where it exceeds 50*l.* and does not exceed 100*l.*—5*s.*, 100*l.* and not 200*l.*—10*s.*, 200*l.* and not 500*l.*—15*s.*, above 500*l.*—1*l.* Where nothing is referred but the mere value of goods, and the repairs of a farm, an appraisement stamp is proper, and not an award stamp. *Leeds v. Burrows*, 12 *East*, 1. *See Jebb v. M'Kiernan, M. and M.* 340, *post. p.* 150. It seems that the words "appraisement or valuation" do not extend to such as are made merely for the private information of parties, but to such only as are intended to be binding between them. *Atkinson v. Fell*, 5 *M. and S.* 243.

Awards.

By 55 Geo. 3, c. 184, schedule, part 1, an award must be stamped with a 1*l.* 15*s.* stamp. The appointment of an umpire made in writing, by two arbitrators, requires no stamp. *Routledge v. Thornton*, 4 *Taunt.* 704. An agreement stamp is not necessary to an arbitration bond, which, besides the usual covenants, contains an agreement as to the payment of costs. *Re Wansborough*, 2 *Chitty*, 40. A paper ascertaining the amount of a person's account requires an award stamp. *Jebb v. M'Kiernan*, *M. and M.* 340, *vide ante p.* 149. The question, whether the opinion of counsel by which parties agree to abide, requires an award stamp, arose, but was not decided, in *Boyd v. Emmerson*, 4 *Nev. and M.* 99.

Bankers' Drafts.

By 55 Geo. 3, c. 184, schedule, part 1, all drafts or orders for the payment of any sum of money to the bearer on demand, and drawn upon any banker or bankers, or any person or persons acting as a banker, who shall reside or transact the business of a banker, within ten miles of the place where such drafts or orders shall be issued, provided such place shall be specified in such drafts or orders, and provided the same shall bear date on or before the day on which the same shall be issued, and provided the same do not direct the payment to be made by bills or promissory notes, are exempted from stamp duty. A draft, drawn upon " A. B., bricklayer," is not within the exemption. *Castleman v. Ray*, 2 *B. and P.* 383. A post-dated draft, though not intended to be used till the day, must be stamped. *Allen v. Keeves*, 1 *East*, 435. The word " date" means the time expressed on the face of the instrument. *Williams v. Jarrett*, 5 *B. and Ad.* 32, 2 *Nev. and M.* 49, *S. C.* Payments made by a banker, under a post-dated draft, drawn by a customer who has no funds in his hands, may be recovered from the holder of the draft, to whom they have been made, and who was acquainted with the fact that the draft was post-dated, of which the banker was ignorant. *Martin v. Morgan*, *Gow*, 128, 3 *B. Moore*, 635, *S. C.; and see Waters v. Brogden*, 1 *Y. and J.* 457.

Bills of Exchange.

By 55 Geo. 3, c. 184, the following stamps are imposed on bills of exchange:

INLAND BILL *of Exchange, draft, or order, to the bearer, or to order, either on demand or otherwise, of any sum of money.*

	£ s.		£ s.	Not exceeding 2 months after date, or 60 days after sight. £ s. d.	If exceeding two months after date, or 60 days after sight. £ s. d.
Amounting to	2 0	and not exceeding	5 5	0 1 0	0 1 6
Exceeding	5 5		20 0	0 1 6	0 2 0
	20 0		30 0	0 2 0	0 2 6
	30 0		50 0	0 2 6	0 3 6
	50 0		100 0	0 3 6	0 4 6
	100 0		200 0	0 4 6	0 5 0
	200 0		300 0	0 5 0	0 6 0
	300 0		500 0	0 6 0	0 8 6
	500 0		1000 0	0 8 6	0 12 6
	1000 0		2000 0	0 12 6	0 15 0
	2000 0		3000 0	0 15 0	1 5 0
	3000 0			1 5 0	1 10 0

Inland bills, drafts, or orders for the payment of any sum of money, though not made payable to the bearer or to order, if the same shall be delivered to the payee, or some person on his behalf, have the same duty as on a bill of exchange, for the like sum payable to bearer or order.

Inland bills, drafts, or orders, for the payment of any sum of money weekly, monthly, or at any other stated periods, if made payable to the bearer or to order, or if delivered to the payee or some person on his behalf, where the total amount of the money thereby made payable shall be specified therein, or can be ascertained therefrom, bear the same duty as on a bill payable to bearer or order, on demand, for a sum equal to such total amount. And where the total amount of the money thereby made payable shall be indefinite the same duty as on a bill, on demand, for the sum therein expressed only.

Where the total amount of the money thereby made payable shall be indefinite, the same duty as on a bill, on demand, for the sum therein expressed only.

And the following instruments *shall be deemed and taken to be* inland bills, drafts, or orders, for the payment of money within the intent and meaning of this schedule; viz.

All drafts or orders for the payment of any sum of money by a bill or promissory note, or for the delivery of any such bill or note in payment or satisfaction of any sum of money, where such drafts or orders shall require a payment or delivery to be made to the bearer, or to order, or shall be delivered to the payee, or some person on his or her behalf.

All receipts given by any banker or bankers, or other person or persons, for money received, which shall entitle the person or persons paying the money, or the bearer of such

receipts, to receive the like sum from any third person or persons.

And all bills, drafts, or orders, for the payment of *any sum of money* out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, if the same shall be made payable to the bearer or to order, or if the same shall be delivered to the payee, or some person on his or her behalf.

It was the object of the legislature, in framing this last provision, to treat as promissory notes and bills of exchange, and to subject to stamp duty, such instruments as, being payable on a contingency, or out of a particular fund, could not, in strictness, fall under that denomination. *Per Lord Ellenborough, Firbank v. Bell,* 1 *B. and A.* 36; *and see Jones v. Simpson,* 2 *B. and C.* 321. In order to prove the payment of money pursuant to order, the following letter was given in evidence: " Messrs. B. and H., when the mahogany, *per* Regent, is sold, you will please pay over to Messrs. P. H. and W. 1500*l.*, in such bills as you receive from the said sale. S. Mann." Messrs. P. H. and W. inclosed this letter in another, addressed by them to B. and H.; and B. and H., in reply wrote, promising to pay over the money. The letter from P. H. and W. was stamped with an agreement stamp; but it was objected that the letter from Mann was an order for payment of money out of a fund which may or may not be available, and that it ought to have been stamped accordingly, and of this opinion was the court. *Firbank v. Bell,* 1 *B. and A.* 36. F. and Co. wrote to S. and Co. the following letter: " We request you will pay to Messrs. H. and Son, or their order, out of the first proceeds that become due of our stock of gunpowder now in your charge, 600*l.* and charge the same to our account." S. and Co., in answer, stated that they had no objection to pay as directed, provided they were in funds for that purpose, and subject to the payment of their advances; and other letters passed on the subject. The two first letters were stamped with an agreement stamp, on payment of a penalty. It was held that this case fell within the authority of *Firbank v. Bell;* and that the first letter was not admissible, not having been stamped at the time when it was written. *Butts v. Swann,* 2 *B. and B.* 78, 4 *B. Moore,* 484, *S. C.* But in order to come within this clause, the instrument should be for the payment of a specified sum; and therefore, where A., having consigned goods to B., sent him the following order,—" Pay to A. B. the proceeds of a shipment of twelve bales of goods, value about 2000*l.*, consigned by me to you;" and B., by writing, consented to pay over the full amount of the net proceeds of the goods, it was held that neither of these instruments came within the above clause. *Jones v. Simpson,* 2 *B. and C.* 318; *and see Rosc. Dig. Bills of Exchange, p.* 31.

As to bills bearing interest, vide *Pruessing v. Ing*, 4 *B. and A.* 204, *post p.* 161.

The word *date* in the schedule of the act means the actual date on the face of the bill, and a bill payable at two months date, and properly stamped as such, is good, though post-dated and issued before the date, the party being liable to a penalty only. *Williams v. Jarrett*, 5 *B. and Ad.* 32, 2 *Nev. and Man.* 49, *S. C.*

Foreign Bills.] A Foreign Bill of exchange (a bill of exchange drawn in, but payable out of Great Britain), if drawn singly, and not in a set, the same duty as on an inland bill of the same amount and tenor.

Foreign Bills of exchange, drawn in sets, according to the custom of merchants, for every bill of each set.

	£		£	s.	d.
Where the sum made payable thereby shall not exceed	100			1	6
And where it shall exceed	100	and not exceed	200	3	0
	200		500	4	0
	500		1000	5	0
	1000		2000	7	6
	2000		3000	10	0
And where it shall exceed			3000	15	0

A bill drawn in Ireland, with blanks for the sum, the date, and the drawee's name, and transmitted to England, in order to have the blanks filled up, does not require an English stamp. *Snaith v. Mingay*, 1 *Mau. and S.* 87. *Crutchly v. Mann*, 5 *Taunt.* 529. So a bill sketched out and accepted here, and transmitted to a person abroad for his signature as drawer, is a foreign bill, and does not require an English stamp. *Boehm v. Campbell*, *Gow*, 56.

A bill payable to the drawer's order, and taken up by him, may be re-issued without a fresh stamp; *Callow v. Lawrence*, 3 *Mau. and S.* 97; *Hubbard v. Jackson*, 4 *Bingh.* 390; but a bill payable to the order of a third person, and paid by the drawer, cannot be re-issued by him, for it would wrongfully charge the payee. *Beck v. Robley*, 1 *H. Bl.* 89 (*n*).

What alteration of a bill requires a new stamp.] If a bill or note is altered in a material part, though by the consent of all parties, and though the alteration be made by a stranger, *Master v. Miller*, 2 *H. Bl.* 141, after it has once issued, it requires a new stamp; *Bayl. on Bills*, 89, *4th ed.*; and such alteration not only makes a new stamp necessary, but vacates the bill (independently of the stamp laws), except as between the parties consenting to such alteration. *Ibid.*; *see Downes v. Richard-*

son, 5 *B and A.* 680. But the alteration of a bill by the drawer, though it prevents him from suing on the bill, will not prevent him from suing the acceptor upon the original consideration, after the bill has become due. *Atkinson v. Hawdon*, 4 *Nev. and M.* 409.

An alteration in the date of a bill, payable after date, *Walton v. Hastings*, 4 *Campb.* 223, *Outhwaite v. Luntley*, 4 *Campb.* 179, or inserting words, rendering a bill or note negotiable, which was not so originally, *Kershaw v. Cox*, 3 *Esp.* 246, *Knill v. Williams*, 10 *East*, 437, or the consideration of the value received, *Knill v. Williams*, 10 *East*, 431, is a material alteration. So where the drawer, without the consent of the acceptor, added the words "payable at Mr. B.'s, Chiswell Street," to the acceptance, this alteration was held to be material; *Cowie v. Halsall*, 4 *B. and A.* 197, *decided after Rowe v. Young*, 2 *B. and B.* 165; and a similar alteration has been held to be material, since the statute 1 and 2 Geo. 4, c. 78, for the right of an indorsee to sue his indorser, would, according to the altered bill, be complete, upon default made at the bankers, and notice thereof; whereas, in truth, the acceptor, not having in reality undertaken to pay there, would have committed no default by such non-payment. *Macintosh v. Haydon*, *R. and M.* 362. *See* 1 *Campb.* 82 (*n*). If the alteration was merely the correction of a mistake, and in furtherance of the original intent of the parties, as inserting the words "or order" in a bill intended to be negotiable, it will not require a new stamp; *Cox v. Kershaw*, 3 *Esp.* 246; so a mistake in the date may be corrected. *Brutt v. Picard*, *R. and M.* 37. *See Bayley on bills*, 92, 4*th ed.*

An alteration in the place of payment mentioned in the acceptance, made by the acceptor, at the request of the payee, six weeks after the bill had been delivered to the latter, was held to be immaterial. *Walter v. Cubley*, 1 *Crom. and M.* 151, 4 *Tyr.* 87, *S. C.*

What is such an issuing of a bill as to render an alteration fatal.] A bill is *primâ facie* considered as issued as soon as it is passed away by the drawer, or accepted by the drawee, and not before. *Bayley on bills*, 93, 4*th ed.* An exchange of acceptances is an issuing; *Cardwell v. Martin*, 9 *East*, 190; but a bill is not issued so as to make an alteration fatal, until it is in the hands of a person entitled to make a claim thereon. *Downes v. Richardson*, 5 *B. and A.* 674. A bill altered before negotiation, without the consent of the acceptor, may be enforced against him, if he assent to the alteration. *Ibid. Kennerly v. Nash*, 1 *Stark.* 452; *and see Jacobs v. Hart*, 2 *Stark.* 45, *Stevens v. Lloyd*, *M. and M.* 292.

The onus of proving the alteration made *before* negotiation lies upon the plaintiff. *Johnson v. Duke of Marlborough*,

2 *Stark.* 313. *Henman v. Dickinson*, 5 *Bingh.* 183; *but see Bishop v. Chambre, M. and M.* 116. *Taylor v. Mosely*, 6 *C. and P.* 279.

An objection to a bill or note, for want of a proper stamp, must be taken before it is read. 2 *Stark. Ev.* 293, 1*st ed.*

Bills of Sale of Ships.

By 6 Geo. 4, c. 41, s. 1, bills of sale, assignments, and mortgages of ships, are exempted from stamp duty.

Bills of Lading.

Bills of lading for goods, merchandise, or effects to be exported, 48 Geo. 3, c. 149, schedule, part 1, or to be carried coast-wise, 55 Geo. 3, c. 184, schedule, part 1, require a 3*s.* stamp.

Bonds.

A bond conditioned for the payment by quarterly payments of an annual rent is within 48 Geo. 3, c. 149, schedule, (similar provision 55 Geo. 3, c. 184,) which imposes a duty on bonds given as a security for the payment of any definite and certain sum of money, and must be stamped accordingly. *Attree v. Anscomb*, 2 *M. and S.* 88. The clause in 48 Geo. 3, c. 149, (similar provision 55 Geo. 3, c. 184,) imposing a stamp upon bonds given as a security for the repayment of any sum or sums of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, is to be construed as applying to the condition of the bond without regard to the amount of the penalty, which is not to be considered as limiting the extent of the security where such bond is given to secure the payment of a final balance or account stated. *Scott v. Allsopp* 2 *Price*, 20. *See Williams v. Rawlinson*, 3 *Bingh.* 71. As to a bond to secure damages and costs, *see Lopez v. De Tastet*, 8 *Taunt.* 712. A bond conditioned for the payment of 1000*l. and interest* on a day certain, requires only a 5*l.* stamp. *Dixon v. Robinson*, 1 *Moo. and Rob.* 115, 5 *C. and P.* 96, *S. C.* So a bond conditioned for the payment of money and interest, and also for the performance of collateral acts, requires only the *ad valorem* stamp appropriated to the principal sum, if that stamp exceeds the stamp (1*l.* 15*s.*) which the collateral matter would require if it stood alone. *Dearden v. Binns*, 1 *Man. and Ry.* 130. But where a bond was given to secure 1000*l.* and *banker's charges for commission*, a 5*l.* stamp was held insufficient. *Dickson v. Cass*, 1 *B. and Ad.* 343. *See Paddon v. Bartlett*, 4 *Nev. and M.* 1. A bond conditioned to secure a London banker from the balance arising from paying bills, &c., for a country banker, containing a stipulation in the condition that the whole amount of monies *to be ultimately recoverable*, should not exceed the sum

of 1000*l.*, does not require a 25*l.* stamp. *Lloyd v. Heathcote*, 1 *Crom. and M.* 336, 3 *Tyr.* 309, *S. C.*

Cognovit.

A cognovit requires no stamp, for it is a mere acknowledgment of an account, unless matter of agreement be contained in it. *Ames v. Hill*, 2 *B. and P.* 150. *Reardon v. Swaby*, 4 *East*, 188. An agreement to grant time, executed afterwards, does not render an agreement stamp on the *cognovit* necessary. *Morley v. Hall*, 2 *Dowl. P. C.* 494.

Deeds.

A deed indorsed on another deed, as a farther security for advances to be made under the latter deed, was held exempted, by 48 Geo. 3, c. 149, from the *ad valorem* duty, the latter deed being stamped with an *ad valorem stamp*. *Robinson v. Macdonnell*, 5 *Mau. and S.* 228. A conveyance by debtors to trustees in trust to sell, and with the proceeds to discharge, first, debts due to the trustees, and then debts due to other creditors, with a resulting trust for the original debtors, does not require an *ad valorem* stamp, as upon a sale or mortgage under 55 Geo. 3, c. 184. *Coates v. Perry*, 3 *B. and B.* 48.

Foreign Instruments.

If a stamp is necessary to render an instrument valid in a foreign country, it cannot be received in evidence without that stamp here. *Per Lord Ellenborough*, *Clegg v. Levy*, 3 *Campb.* 167. *Alves v. Hodgson*, 7 *T. R.* 241. A deed made in England to be carried into effect abroad must be stamped; *Stonelake v. Babb*, 5 *Burr.* 2673; but a contract made at sea requires no stamp. *Ximenes v. Jacques*, 1 *Esp.* 311. As to the stamp of a bill of exchange drawn in Ireland, but filled up here, *vide ante p.* 153.

Where in an action on a bill dated Paris, the defence was that it was drawn in London, and so void for want of a stamp, and it was proved that the drawer was in London on the 3d of March (the bill being dated the 1st), Lord Ellenborough said "It is not probable that this bill was drawn in Paris 1st March, but if it were proved ever so distinctly that it was not drawn in Paris 1st March, it would not follow that it was not drawn there at some other time, or that it was drawn in England. Drawing here with a foreign date, to evade the stamp duties, is a very serious offence, and the fact must be made out by distinct evidence." *Abraham v. Du Bois*, *Bayley*, 67. 4 *Campb.* 269. *Bire v. Moreau*, 2 *C. and P.* 376.

Leases.

By the 55 Geo. 3, c. 184, the following duties are imposed on leases:

	Duty. £ s. d.
Lease or tack of any lands, hereditaments, or heritable subjects, granted in consideration of a sum of money by way of fine, premium, or grassum paid for the same, without any yearly rent, or with any yearly rent under 20*l*.	*The same duty as for the conveyance on the sale of lands for a sum of money of the same amount.*
(Save and except leases and tacks for a life or lives not exceeding three, or for a term of years determinable with a life or lives not exceeding three, by whomsoever granted, and leases for a term absolute, not exceeding twenty-one years, granted by *ecclesiastical corporations aggregate or sole.*)	
Lease or tack of any lands, hereditaments, or heritable subjects, at a yearly rent, without any sum of money by way of fine, premium, or grassum, paid for the same:	
When the yearly rent shall not amount to 20*l*.	1 0 0
And where the same shall amount to 20*l*. and not amount to 100*l*	1 10 0
And where the same shall amount to 100*l*. and not amount to 200*l*.	2 0 0
And where the same shall amount to 200*l*. and not amount to 400*l*.	3 0 0
And where the same shall amount to 400*l*. and not amount to 600*l*.	4 0 0
And where the same shall amount to 600*l*. and not amount to 800*l*.	5 0 0
And where the same shall amount to 800*l*. and not amount to 1000*l*.	6 0 0
And where the same shall amount to 1000*l*. or upwards	10 0 0
Lease or tack of any land, hereditaments, or heritable subjects, *granted in consideration of a sum of money* by way of fine, premium, or grassum, and also of a yearly rent amounting to 20*l*. or upwards . . (*Save and except the leases and tacks hereinbefore excepted.*)	*Both the* ad valorem *duties payable for a lease in consideration of a fine only, and for a lease in consideration of a rent only of the same amount.*
Lease or tack of any kind, not otherwise charged in this schedule	1 15 0

	£ s. d.
And for the counterpart or duplicate of any lease or tack hereby charged with a duty not exceeding 1*l*.	*The like duty as on the lease or tack.*
And for the counterpart or duplicate of any other lease or tack whatsoever . . .	1 10 0
And where any such lease or tack, counterpart or duplicate, as aforesaid, together with any schedule, receipt, or other matter, put or indorsed *thereon, or annexed thereto,* shall contain 2160 words or upwards, then for every entire quantity of 1080 words *contained therein*, over and above the first 1080 words, a further progressive duty of . . .	1 0 0

Exemptions from the preceeding and all other stamp duties.

Leases or tacks of waste or uncultivated lands to any poor or labouring persons, for any term of years not exceeding three lives, or ninety-nine years, where the fine shall not exceed five shillings, nor the reserved rent one guinea per annum; and the counterparts or duplicates of all such leases.

A 3*l*. stamp is not sufficient on a lease reserving 370*l*. for house and land; and, by a distinct reservation, 50*l*. for furniture and fixtures. *Coster v. Cowling*, 7 *Bingh*. 457.

The stamp required for a lease is regulated by the consideration (whether fine or rent) *expressed* to be paid, and not by that which is actually paid. *Doe v. Lewis*, 10 *B. and C*. 673.

The plaintiff, a termor, in consideration of 100*l*. and a yearly sum of 75*l*. payable quarterly, by indenture underdemised and leased to the defendant the premises for a longer term than he had in them himself. The indenture bearing a 30*s*. stamp was held inadmissible on an issue of *assignment*. *Baker v. Gostling*, 1 *Bingh. N. C*. 246, 4 *M. and Scott*, 589, *S. C*. Where a lease contained a demise of two farms with two different *habendums* and separate reservation of rents and covenants, some applying to one farm and some to another, one *ad valorem* stamp for the amount of both rents was held sufficient. *Blount v. Pearman*, 1 *Bingh. N. C*. 408.

Where a farming lease refers to an expired lease for the covenants, the expired lease is not "a schedule, catalogue, orinventory," within 55 Geo. 3, c. 184, schedule, part 1, requiring a 25*s*. stamp. *Strutt v. Robinson*, 3 *B. and Ad*. 395.

Policies of Insurance.

By 35 Geo. 3, c. 63, s. 13, "nothing in that act shall be construed to extend to prohibit the making of any alteration,

which may lawfully be made, in the terms or conditions of any policy of insurance duly stamped, after the same shall have been underwritten; or to require any additional stamp duty by reason of such alteration, so that such alteration be made before notice of the determination of the risk originally insured, and the premium or consideration originally paid or contracted for exceed the rate of 10*s.* per cent. on the sum insured; and so that the thing insured shall remain the property of the same person or persons; and so that such alteration shall not prolong the term insured beyond the period allowed by that act, and so that no additional or further sum shall be insured by reason or means of such alteration." A mere extension of the time of sailing is within the above clause, and the alteration requires no new stamp. *Kensington v. Inglis*, 8 *East*, 273. *See Brockelbank v. Sugrue*, 1 *Barn. and Adol.* 81. So a memorandum waiving the warranty of sea-worthiness. *Weir v. Aberdeen*, 2 *B. and Ald.* 325. But where a policy on "a ship and outfit" was altered, by inserting "ship and goods," it was held to require a new stamp; *Hill v. Patten*, 8 *East*, 373; and to be void against the underwriters, though they had assented to the alteration. *Ibid.*

By statute 5 & 6 W. 4, c. 64, s. 2 and 3, on a policy on life where the sum insured does not exceed 50*l.* the stamp is 2*s.* 6*d.*, where above 50*l.* and not 100*l.*, 5*s.*

Promissory Notes.

By 55 Geo. 3, c. 184, schedule, part 1, a promissory note, for the payment, to the *bearer on demand*, of any sum of money, is subject to the following duties:

	£	s.		£	s.	£	s.	d.
Not exceeding	1	1	. . . .	0	0	0	0	5
Exceeding .	1	1	and not exceeding	2	2	0	0	10
	2	2	. . . .	5	5	0	1	3
	5	5	. . . .	10	0	0	1	9
	10	0	. . . .	20	0	0	2	0
	20	0	. . . .	30	0	0	3	0
	30	0	. . . .	50	0	0	5	0
	50	0	. . . .	100	0	0	8	6

which said notes may be re-issued after payment thereof, as often as shall be thought fit.

Promissory note for the payment, in any other manner than to the bearer on demand, but not exceeding two months after date, or sixty days after sight, of any sum of money:

	£	s.		£	s.	£	s.	d.
Amounting to	2	0	and not exceeding	5	5	0	1	0
Exceeding .	5	5	. . . .	20	0	0	1	6

	£	s.		£	s.	£	s.	d.
Amounting to	20	0	and not exceeding	30	0	0	2	0
Exceeding .	30	0	. . . .	50	0	0	2	6
	50	0	. . . .	100	0	0	3	6

These notes are not to be re-issued after being once paid.

Promissory note for the payment, either to the bearer on demand, or in any other manner than to the bearer on demand, but not exceeding two months after date, or sixty days after sight, of any sum of money:

	£		£	£	s.	d.
Exceeding .	100	and not exceeding	200	0	4	6
	200	. . . .	300	0	5	0
	300	. . . .	500	0	6	0
	500	. . . .	1000	0	8	6
	1000	. . . .	2000	0	12	6
	2000	. . . .	3000	0	15	0
	3000	. . . .		1	5	0

The notes are not to be re-issued after being once paid.

Promissory note for the payment to the bearer or otherwise, at any time exceeding two months after date, or sixty days after sight, of any sum of money:

	£	s.		£	s.	£	s.	d.
Amounting to	2	0	and not exceeding	5	5	0	1	6
Exceeding .	5	5	. . . .	20	0	0	2	0
	20	0	. . . .	30	0	0	2	6
	30	0	. . . .	50	0	0	3	6
	50	0	. . . .	100	0	0	4	6
	100	0	. . . .	200	0	0	5	0
	200	0	. . . .	300	0	0	6	0
	300	0	. . . .	500	0	0	8	6
	500	0	. . . .	1000	0	0	12	6
	1000	0	. . . .	2000	0	0	15	0
	2000	0	. . . .	3000	0	1	5	0
	3000	0	. . . .			1	10	0

These notes are not to be re-issued after being once paid.

A promissory note for 40*l.* payable to A. B., or bearer, is in law payable on demand, and requires a 5*s.* stamp. *Whitlock v. Underwood*, 2 *B. and C.* 157. A promissory note payable to M. M. without the words "order" or "bearer," and without any indication of the time of payment, is not a promissory note *payable to the bearer on demand* within the statute. *Cheetham v. Butler*, 2 *Nev. and M.* 453, 5 *B. and Ad.* 837, *S. C.* So a note whereby A. promised to pay B. on demand 20*l.* with lawful interest until payment. *Dixon v. Chambers*, 1 *Crom.*

M. and R. 845. In this case it is said that *Keates v. Whieldon*, 8 *B. and C.* 7, is overruled.

The reservation of interest is not to be considered an addition to the sum advanced so as to require a larger stamp; thus a stamp applicable to a note not exceeding 30*l.*, is applicable to a note for payment of 30*l.* at three months after date, with interest from the date. *Pruessing v. Ing*, 4 *B. and Ald.* 204. *See Doe v. Snaith*, 8 *Bingh.* 147; *and see ante*, *Bonds, p.* 153.

Where a joint and several note, for securing the repayment of a loan, was signed first by one, and some days afterwards by the other party, it was held not to require an additional stamp, if the last signature was put before the money was advanced, or if the party last signing had promised to sign the note before the advance, notwithstanding it might not have been signed till afterwards. *Ex parte White*, 3 *Deac. and Chit.* 366.

Receipts.

Receipts or discharges given for or upon the payment of money require the following stamps by 55 Geo. 3, c. 184, schedule, part 1:

	£		£	£	s	d.
Amounting to	5	. . . .	10	0	0	3
	10	. . . .	20	0	0	6
	20	. . . .	50	0	1	0
	50	. . . .	100	0	1	6
	100	. . . .	200	0	2	6
	200	. . . .	300	0	4	0
	300	. . . .	500	0	5	0
	500	. . . .	1000	0	7	6
	1000 or upwards	. . . . . .		0	10	0
When in full of all demands		. . . .		0	10	0

By the statute 3 and 4 Wm. 4, c. 23. s. 1, receipt stamps for any sum under 5*l.* are abolished.

An acknowledgment of having received acceptances, with an undertaking to provide for them, has been held to require a receipt stamp. *Scholey v. Walsby*, *Peake*, 24. So a bill of parcels subscribed "settled by two bills, one at nine, the other at twelve months," was held by Lord Ellenborough to be an acquittance, which could not be evidence unless stamped. *Smith v. Kelby*, *Peake*, 25 (*n*), 4 *Esp.* 249, *S. C.* So the word "settled" under a bill. *Spawforth v. Alexander*, 2 *Esp.* 621. An account containing acknowledgments of sums received, made at successive times upon the payment of the money, requires a stamp; it differs from an account current where the sums stated to be received are not written in the account, at and upon the receipt of the money, but long after, and only amount to admissions of money received at an antecedent

time. *Wright v. Shawcross*, 2 *B. and A.* 501 (*n*). *See Jacob v. Lindsay*, 1 *East*, 460. *Hawkins v. Warre*, 3 *B. and C.* 696. A mere acknowledgment, not of the payment of money, but of a sum due and owing, (as an I. O. U.) requires no stamp. *Fisher v. Leslie*, 1 *Esp.* 426. *Israel v. Israel*, 1 *Campb.* 499. *Childers v. Bulnois*, *Dow. and Ry. N. P. C.* 8 ; *but see Guy v. Harris*, *Chitty on Bills*, 428, *5th ed. contra.* *See also Green v. Davies*, 4 *B. and C.* 235. So an instrument in these terms, "Mr. T. has left in my hands 200*l.*;" *Tomkins v. Ashby*, 6 *B. and C.* 541 ; or in these, "I have in my hands three bills which amount to 120*l.* 10*s.* 6*d.* which I have to get discounted or return on demand." *Mullett v. Huchison*, 7 *B. and C.* 639, 1 *M. and R.* 522, *S. C.* So the acknowledgment of the correctness of an account containing a statement of sums advanced, and disbursements made, has been held to require no stamp. *Wellard v. Moss*, 1 *Bingh.* 134. A receipt is not inadmissible as such, because it notices the terms and consideration upon which the money was paid. *Watkins v. Hewlett*, 1 *B. and B.* 1. So although it contain subsequent matter of agreement, and has no agreement stamp ; *Grey v. Smith*, 1 *Campb.* 387 ; unless the agreement control or qualify what goes before, when the paper will be inadmissible without an agreement stamp. *Ibid.* *See Corder v. Drakeford*, 3 *Taunt.* 382. *Clayton v. Burtenshaw*, 5 *B. and C.* 45. Where the indorsements of receipts on a bond have left no blank space for receipts of subsequent payments to be written on the bond, such receipts written on an unstamped piece of paper annexed to the bond are within the exemption of 55 Geo. 3, c. 184, schedule, part 1, and admissible. *Orme v. Young*, 4 *Campb.* 336. An unstamped receipt may be used by a witness to refresh his memory. *Rambert v. Cohen*, 4 *Esp.* 213. *Maughan v. Hubbard*, 8 *B. and C.* 14.

COURSE OF EVIDENCE AND PRACTICE.

Before the jury are sworn, the counsel for the plaintiff has a right, on the cause being called on, to have a witness called on his *subpœna*. *Hopper v. Smith*, *M. and M.* 115.

When the jury are sworn, the junior counsel for the plaintiff opens the pleadings, after which, if the proof of the issue rest on the plaintiff, the senior or leading counsel states the case to the jury, and after calling and examining witnesses in support of it, the counsel for the defendant are heard, and if they call any witnesses, the plaintiff's counsel have the general reply. *Tidd*, 908. Where there are several issues, some of which are incumbent on the plaintiff, and others on the defendant, it is usual for the plaintiff to begin, and to prove those which are

essential to his case; *Jackson v. Hesketh*, 2 *Stark*. 521; the defendant then does the same, and afterwards the plaintiff is entitled to go into evidence to controvert the defendant's affirmative proofs. The defendant's counsel is entitled to a reply upon such evidence, in support of his own affirmative, and the plaintiff's counsel to a general reply. 1 *Stark. Ev.* 342, 1*st ed.* Where a party tenders evidence *primâ facie* admissible, the other party will not be allowed to interpose with evidence for the purpose of excluding it; but it should be received, and expunged, if afterwards shown not to be properly receivable. *Jones v. Fort, M. and M.* 196.

Whether the plaintiff is bound to go into his whole case in the first instance.] It was laid down as a general rule by Lord Ellenborough, that when by pleading or by means of notice, the defence is known, the counsel for the plaintiff is bound to open the whole case in chief, and cannot proceed in parts, unless some specific fact can be adduced by the defendant, to which the plaintiff can give an answer, but that he cannot go into general evidence in reply. *Rees v. Smith*, 2 *Stark.* 31. But the practice is now altered, and the plaintiff's counsel is at liberty, either at once to enter into the whole of his case, or to make out a *primâ facie* case only, and to reserve his answer to the defendant's case for the reply, but he cannot answer part of the defendant's case in his opening and part in the reply. *Browne v. Murray, R. and M.* 254. *Sylvester v. Hall, Id.* 255 (*n*). 1 *Stark. Ev.* 383. *And see Williams v. Davies*, 1 *Crom. and M.* 464, *post.*

Right to begin—when with the plaintiff.] In consequence of the difficulty which frequently occurred in determining, in each particular case, which party is entitled to begin, the judges have recently come to a resolution, which is stated by Tindal, C. J., in the following terms: "A resolution has recently been come to by all the Judges, that in cases of slander, libel, and other actions, where the plaintiff seeks to recover actual damages of an unascertained amount, he is entitled to begin, although the affirmative of the issue may, in point of form, be with the defendant." *Carter v. Jones*, 1 *Moo. and Rob.* 281, 6 *C. and P.* 64, *S. C.* Thus, in an action for false imprisonment, with a justification (and no general issue) pleaded, and a replication of *de injuriâ*, the plaintiff is entitled to begin. *Atkinson v. Warne*, 6 *C. and P.* 687. Where the justification raises a mere matter of right, as a justification under a warrant to levy a poor-rate, the case is not within the above rule. *Burrell v. Nicholson*, 1 *Moo. and Rob.* 304. Nor does the rule extend to such cases as covenant with *duress* pleaded. *Reeve v. Underhill*, 6 *C. and P.* 773.

In replevin, where the defendant avowed for rent, and the

plaintiff pleaded in bar an agreement to set-off another sum against the rent, and issue was taken on that plea, the plaintiff was held entitled to begin. *Curtis v. Wheeler*, 4 *C. and P.* 196. *Williams v. Thomas, Id.* 234.

Right to begin—when with the defendant.] Where the general issue is not pleaded, but issue is joined on a collateral matter, as on the execution of a release in assumpsit or debt, or a right of way in trespass, the proof of which rests upon the defendant, his counsel begin, after the pleadings are opened, and have the general reply. *Tidd*, 908. So in trespass, where the general issue is pleaded as to the coming with force and arms, &c., and a justification as to the rest, the issue upon which lies upon the defendant. *Jackson v. Hesketh*, 2 *Stark.* 518. So where *lib. ten.* is pleaded, and no general issue. *Pearson v. Coles*, 1 *Moo. and Rob.* 206. So where the defendant, a constable, being sued in trespass, pleaded a justification without the general issue, it was held, that his counsel, admitting the demand of a copy and perusal of the warrant, (24 Geo. 2, c. 44,) was entitled to begin. *Burrell v. Nicholson*, 6 *C. and P.* 202, 1 *Moo. and Rob.* 305, *S. C.* Where, in assumpsit on a bill of exchange, with a count on an account stated, the defendant pleaded payment to the bill, and non assumpsit to the account stated, and the plaintiff offered no evidence on the account stated, the defendant was allowed to begin. *Smart v. Rayner*, 6 *C. and P.* 721. Where the defendant pleads a plea, averring notice, and issue is taken on the fact of notice, the defendant begins. *Warner v. Haines*, 6 *C. and P.* 666 So where a defendant in replevin pleads property as a third person and issue is taken thereon, he is entitled to begin. *Colstone v. Hiscolbs*, 1 *Moo. and Rob.* 301.

The rule on this subject, as established in practice, was said by Lord Tenterden to be, that when the general issue is not pleaded, and the affirmative of the issue lies on the defendant, he is to begin. *Cotton v. James, M. and M.* 275. And accordingly it was held, that in an action for a libel, where a justification, without the general issue, was pleaded, the defendant was entitled to begin. *Cooper v. Wakley, M. and M.* 248. *Wood v. Pringle*, 1 *Moo. and Rob.* 277. But the practice, in this respect, in certain actions, has been lately altered by a resolution of all the judges. *Vide ante p.* 163.

In some cases, by admitting a *primâ facie* title in the plaintiff, the defendant may entitle himself to begin. This usually occurs in cases of ejectment. In ejectment by a person claiming under a will, against another claiming under a codicil, the defendant having admitted the will, was held to have the right of beginning. *Doe v. Corbet*, 3 *Camph.* 368. *See Peake, Ev.* 6 (*n*), *5th ed.* So where the lessors of the plaintiff claimed, through several descents, from a particular ancestor, and the

defendant claimed under the will of that ancestor, it was ruled by Lord Denman, C. J., that the defendant, admitting all the descents but the last, was entitled to begin. The Chief Justice referred to a case, where the lessor of the plaintiff claimed under a prior will, and the defendant under a subsequent will, and the defendant admitting the prior will, was permitted to begin. *Doe v. Barnes*, 1 *Moo. and Rob.* 386. It has been ruled, that in order to entitle the defendant to begin, by admitting the plaintiff's case, he must admit the whole of it. *Doe v. Tucker, M. and M.* 536. *Doe v. Wilson*, 6 *C. and P.* 301, 1 *Moo. and Rob.* 323, *S. C.* Where, by rule of court, the defendant is under an obligation to admit the plaintiff's case, this does not deprive the latter of his right to begin *Thwaites v. Lainsbury*, 5 *C. and P* 69.

Right to begin—plea in abatement.] Which party is entitled to begin, upon an issued joined on a plea in abatement, has been the subject of conflicting decisions. Upon the ground that the plaintiff is bound to prove the amount of his damages, Abbot, C. J., ruled, that his counsel was, if he elected to do so, entitled to begin; but that if the defendant admitted the amount he might begin. *Lacon v. Higgins*, 3 *Stark.* 178. *Roby v. Howard*, 2 *Stark.* 555. *Stansfeld v. Levy*, 3 *Stark.* 8. So on a plea that the promise was not made with the plaintiff alone, but with the plaintiff and J. S., and a replication taking issue thereon, Parke, B., ruled that the plaintiff was to begin. *Davies v. Evans*, 6 *C. and P.* 619. But in another case Bayley, J., directed that the defendant should begin, and that the question of damages should, if necessary, be settled afterwards. *Anon.* 2 *Stark. Ev.* 2, 1*st ed.* And it was likewise held, that the *onus* of proving damages does not confer the right to begin. *Bedell v. Russell, R. and M.* 293. So in an action on a bill of exchange, where the non-joinder of a joint contract or was pleaded in abatement, Lord Tenterden permitted the defendant to begin, and said, "That the most convenient rule was, that wherever it appears on the record, or by the statement of counsel, that there is really no dispute about the sum to be recovered, that the damages are either nominal, or mere matter of computation, then if the affirmative is on the defendant, he is entitled to begin." *Fowler v. Coster, M. and M.* 241.

Right to reply.] In general, the party who begins has the right to the general reply; but there are many cases to which this rule does not apply. Thus, where in ejectment, the lessor of the plaintiff proved his pedigree and stopped, and the defendant set up a new case, which the lessor of the plaintiff answered by evidence; it was held that the defendant was entitled to the general reply. *Goodtitle v. Braham*, 4 *T. R.* 497. But where

the defendant brings evidence to impeach the plaintiff's case, and also sets up an entire new case, which again the plaintiff controverts by evidence, the defendant's reply in such case is confined to the new case set up by him, for upon that relied upon by the plaintiff, his counsel has already commented in the opening of the defendant's case, and the plaintiff is entitled to the general reply. 1 *Stark. Ev.* 384, 1*st ed. Meagoe v. Simmons*, 3 *C. and P.* 76. Where the defendant's counsel goes for a nonsuit, on a point of law, and calls evidence in support of his objection, and the plaintiff's counsel answers it, the defendant's counsel has the right to reply. *Arden v. Tucker*, 1 *Moo. and Rob.* 192.

Unless the defendant gives evidence, the plaintiff is not entitled to reply, there being no facts upon which his counsel can observe. With regard to what shall be considered evidence on the part of the defendant, it has been held that where the defendant proves a payment to the plaintiff, by showing the particulars of demand delivered under a judge's order, in which credit is given for the amount, this is the evidence of the defendant, and entitles the plaintiff to reply. *Rymer v. Cook, M. and M.* 86 (*n*). This decision was before the rule requiring the annexation of the particulars to the declaration.

Where the counsel for the defendant opens facts to the jury, which he calls no witnesses to prove, it is in the discretion of the judge to permit the plaintiff's counsel to reply. *Crerar v. Sodo, M. and M.* 85. Though it was formerly thought that he was entitled to a reply as of right. *R. v. Horne*, 20 *How. St. Tr.* 763.

Addressing the jury and examining witnesses.] Where several defendants in the same interest defend separately, it was ruled by Gibbs, C. J., that the senior counsel can alone address the jury, and the witnesses are to be examined by the counsel successively, in the same manner as if the defence were joint and not separate. *Chippendale v. Masson*, 4 *Campb.* 174. And in ejectment where the defendants defended in the same right, but by different attornies and counsel, Lord Tenterden ruled that only one counsel could address the jury. *Doe v. Tindal, M. and M.* 314, 3 *C. and P.* 565, *S. C*; *and see Perring v. Tucker, M. and M.* 392. But in some cases counsel for each party have been allowed to cross-examine and to address the jury. *King v. Williamson*, 3 *Stark.* 162; *and see Massey v. Goyder*, 4 *C. and P.* 162. And this was permitted in a very late case. *Ridgway v. Philip*, 1 *Crom. M. and R.* 415. The leading counsel has a right, in his discretion, to interpose, and to take the examination of a witness out of the hands of his junior, but after one counsel has brought the examination to a close, a question cannot regularly be put to the witness

by another counsel on the same side. *Doe v. Roe,* 2 *Campb.* 280. 20 *How. St. Tr.* 664.

Where it is ordered, on an issue out of Chancery, that a third party shall be at liberty to attend the trial, the counsel for such party may cross-examine and suggest points of law, but cannot call witnesses or address the jury. *Wright v. Wright,* 7 *Bingh.* 458.

A party appearing in person, must examine the witnesses as well as address the jury. Counsel can only be heard to assist him on legal objections. *Shuttleworth v. Nicholson,* 1 *M. and Rob.* 254.

Costs—certificate under 43 *Eliz. c.* 6.] By statute 43 Eliz. c. 6, (extended to Wales and the Counties Palatine by 11 and 12 Wm. 3, c. 9,) it is enacted, that, "if in any personal action, to be brought in any of her Majesty's Courts of Westminster, not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery, it shall appear to the judges of the same court, and be so signified by the justices before whom the same shall be tried, that the debt or damages to be recovered therein shall not amount to the sum of 40s., that in every such case the judges or justices, before whom such action shall be pursued, shall not award to the plaintiff any more costs than the sum of the debt or damages so recovered shall amount to, but less at their discretion."

This certificate need not be granted at the trial; it may be at any time indorsed on the *postea. Foxall v. Banks,* 5 *B. and A.* 536.

A judge may certify under this statute, in an action on a statute giving the plaintiff the full costs of suit, as the 11 Geo. 2, c. 19, s. 19. *Irwine v. Reddish,* 5 *B. and A.* 796. A plea of justification does not prevent the judge from certifying. *Walker v. Robinson,* 1 *Wils.* 93. If the action be for assault, *battery,* and false imprisonment, yet if no *battery* be proved the judge may certify; *Emmett v. Lyne,* 1 *Bos. and Pul. N. R.* 255; and even where a battery is proved, the judge may certify as to the assault and imprisonment, and then by 22 and 23 Car. 2, (*see post,*) the plaintiff will be deprived of his costs upon the battery also. *Wiffin v. Kincard,* 2 *B. and P. N. R.* 471. *Briggs, v. Bowgin,* 2 *Bingh.* 333. So in an action for an injury to a right of common by digging turves. *Edmonson v. Edmonson,* 8 *East,* 296. But where in trespass for breaking and entering the plaintiff's close, and digging a ditch and cutting down a tree, with a count on an *asportavit,* the defendant pleaded not guilty, and *lib. ten.*, upon which the plaintiff took issue, and the question was whether the tree grew on the plaintiff's or defendant's ground, the jury having found a verdict for the plaintiff, with 38*s*. damages, the value of the tree, and

the judge having certified under 43 Eliz., the court held the case not within the statute, for that the freehold must necessarily have come in question. *Littlewood v. Wilkinson*, 9 *Price*, 314. Where one of two defendants suffers judgment by default, and on the trial of the issue, as to the other, and the assessment of damages as to him, the jury assess the latter at 1*s*., the judge may certify as to the latter. *Harris v. Duncan*, 4 *Nev. and M.* 63.

Costs—certificates under 22 & 23 *Car.* 2, *c.* 9.] By this statute (extended to the Counties Palatine by 11 & 12 Wm. 3, c. 9), it is enacted that "in all actions of *trespass, assault,* and *battery*, and other personal actions, wherein the judge, at the trial of the cause, shall not find and certify under his hand, upon the back of the record, that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in question, the plaintiff, in case the jury shall find the damages to be under 40*s*., shall not recover or obtain more costs of suit than the damages so found shall amount unto."

It seems that the certificate need not be granted at the trial of the cause. *Butler v. Cozens*, 11 *Mod.* 198; 2 *Tidd*, 1008, 9*th ed.*

The construction on this statute has been that it relates only to the two species of action therein specially named, of trespass, and assault and battery; and that the action of trespass is confined to trespass *quare clausum fregit*, wherein the freehold or title of the land may come in question. *Per Lord Ellenborough, Stead v. Gamble*, 7 *East*, 328. Where the plaintiff declares for an injury to his freehold, or to something growing upon (*Stead v. Gamble*, 7 *East*, 325), or affixed to the freehold (*Bull. N. P.* 329, *Barnes*, 121), the case is within the statute. In an action for mesne profits, where the damages recovered are under 40*s*., the plaintiff is entitled to no more costs than damages. *Doe v. Davies*, 6 *T. R.* 593. Where a declaration, *quare clausum fregit*, charges the defendant with taking and carrying away the soil and earth, &c., if this be merely a mode or qualifications of the injury done to the land, the case is still within the statute. *Clegg v. Molyneux, Dougl.* 779. So in trespass for assaulting and beating the plaintiff and turning him out of a justice room, whereby he was prevented from exercising his business of an attorney, the plaintiff having recovered 1*s*. damages was held to be entitled only to the same costs; and per Lord Tenterden, the general opinion has been that, where the consequential damage is laid as an aggravation of the trespass sued for, the plaintiff can have no more costs than damages. *Daubney v. Cooper*, 10 *B. and C.* 830. So where the declaration stated that the defendant

assaulted the plaintiff, and then and there struck a certain horse on which the plaintiff was riding, the court said that as it did not appear that there was a separate assault upon the horse, it was only one transaction, and that it was within the statute. *Bannister v. Fisher*, 1 *Taunt.* 358. If the declaration states a tearing of the clothes to be done at the same time with a battery, it will be construed to be part of the same act, and a consequence of the battery, and the case will be within the statute. *Mears v. Greenaway*, 1 *H. Bl.* 292; *see Weatherell v. Howard*, 3 *Bingh.* 135. But should the jury find the *laceravit* to be a distinct injury, the plaintiff will be entitled to his full costs. *Cotterill v. Tolly*, 1 *T. R.* 655.

An injury done to a personal chattel is not within the statute. *Keen v. Whistler*, 1 *Str.* 534. *Tidd*, 1000, *9th ed.* And where it is alleged in the same declaration with a trespass to real property, or a battery, yet provided it be a substantive and independent injury, and not merely an aggravation of damages, or a mode or qualification of the injury to real property, &c., and general damages under 40*s.* are given, the case is not within the statute. *Smith v. Clarke*, 2 *Str.* 1130. Thus where the declaration alleged a breaking, and entering, and seizing, &c., a number of jars, and in the second count an *asportavit* of a number of jars, a general verdict of 1*s.* damages having been found, Lord Ellenborough was of opinion that the plaintiff was entitled to full costs. *Gosson v. Graham*, 1 *Stark.* 55.

Nor are those cases within the statute, where the defendant pleads a special plea of justification, which is found against him, for then it must appear, either that the freehold cannot come in question, in which case the statute does not apply, or that the freehold does come in question, in which case a certificate is unnecessary. Thus where to trespass, *quare clausum fregit*, the defendant pleaded the general issue, and a license, and on issue joined, both the pleas were found for the plaintiff, with 1*s.* damages, he was held entitled to full costs. *Redridge v. Palmer*, 2 *H. Bl.* 2. *Comer v. Baker*, 2 *H. Bl.* 341, 2 *Rosc. Act. relating to Real Prop.* 700. And where, to a declaration for assaulting, *beating*, &c. the plaintiff, the defendant pleaded the general issue, and a justification as to the *assaulting* only, it was held that the plaintiff recovering 1*s.* damages was entitled to full costs without a certificate. *Johnson v. Northwood*, 7 *Taunt.* 689, 1 *B. Moore*, 420, *S. C.*; *Tidd*, 1000, 8*th ed.*

Costs—4 and 5 Wm. and M. c. 23, *s.* 10.] This statute, after reciting that great evils ensue by inferior tradesmen, apprentices, and other dissolute persons, neglecting their trades and employments, who follow hunting, fishing, and other game, to

the ruin of themselves, and damage of their neighbours, enacts that "if any such person shall presume to hunt, hawk, fish, or fowl (unless in company with the master of such apprentice, duly qualified by law), such person shall be subject to the penalties of this act, and shall or may be sued and prosecuted for his wilful trespass in such his coming on any person's land; and if found guilty thereof the plaintiff shall not only recover his damages thereby sustained, but his full costs of suit; any former law to the contrary notwithstanding."

Where the plaintiff declared "for that the defendant being a dissolute person, neglecting his employment, and following hunting and other game, and by no means qualified by law so to do," broke and entered the plaintiff's closes, and the trespass was proved, but not that the defendant was a dissolute person, it was held that the plaintiff was entitled to recover, but that the verdict being under 40*s*. no more costs than damages could be given. *Pallant v. Roll*, 2 *W. Bl.* 900. A clothier and an alehouse keeper have been held to be inferior tradesmen; *Wickham v. Walker*, *Barnes*, 125; but the court of Common Pleas was equally divided on the question whether a surgeon and an apothecary, not qualified, was within the act. *Buxton v. Murgay*, 2 *Wils.* 70. Holt, C. J., was of opinion that all tradesmen not qualified are inferior tradesmen within the act. *Wickham v. Walker*, *Barnes*, 125; *but see* 2 *Wils.* 70.

Costs—certificate under statute 8 *and* 9 *W.* 3, *c.* 11, *s.* 4.] By this statute, for the preventing of wilful and malicious trespasses, it is enacted that "in all actions of trespass to be commenced or prosecuted in any of his Majesty's courts of record at Westminster, wherein at the trial of the cause it shall appear and be certified by the judge under his hand, upon the back of the record, that the trespass upon which any defendant shall be found guilty, was *wilful* and *malicious*, the plaintiff shall recover not only his damages, but his full costs of suit; any former law to the contrary notwithstanding." The certificate under this act need not be granted at the trial of the cause. *Woolley v. Whitby*, 2 *B. and C.* 580. It is in the discretion of the judge to grant or withhold the certificate. *Good v. Watkins*, 3 *East*, 495. *Woolley v. Whitby*, 2 *B. and C.* 583; *but see Reynold v. Edwards*, 6 *T. R.* 11.

Costs—proof of public documents, &c. and handwriting.] By the rules of H. T. 2 W. 4. (VI), it is ordered "that the expense of a witness, called only to prove the copy of any judgment, writ, or other public document, shall not be allowed in costs, unless the party calling him shall, within a reasonable time before the trial, have required the adverse party, by notice in writing, and production of such copy, to admit such copy, and

unless such adverse party shall have refused or neglected to make such admission."

"And it is further ordered, that the expense of a witness, called only to prove the handwriting to, or the execution of, any written instrument stated on the pleadings, shall not be allowed, unless the adverse party shall, upon summons before a judge, a reasonable time before the trial (such summons stating therein the name, description, and place of abode of the intended witness), have neglected to refuse or admit such handwriting or execution; or unless the judge, on attendance before him, shall indorse upon such summons that he does not think it reasonable to require such admissions."

Withdrawing the record.] Where the record is withdrawn on the ground of the absence of a material witness, such witness is liable to an action for disobeying the *subpœna*, though the jury have not been sworn. *Mullett v. Hunt*, 1 *Crom. and M.* 752. Where the plaintiff withdraws the record after obtaining a special jury, the defendant taking the record down by proviso may have the cause tried by a common jury. *R. v. Derbishire*, 1 *Moo. and Rob.* 307.

Nonsuit.] The plaintiff may elect whether he will submit to a nonsuit, or go to the jury. *Watkins v. Towers*, 2 *T. R.* 281. *Minchin v. Clement*, 1 *B. and A.* 252. But if he submits, out of deference to the opinion of the judge, he will not be precluded from moving the court to set aside the nonsuit. *Alexander v. Barker*, 2 *C. and J.* 136. Where an objection is taken on behalf of a defendant, with a view to a nonsuit, and is overruled by the judge, the defendant's counsel should apply for leave to move to enter a nonsuit. *Minchin v. Clement*, 1 *B. and A.* 252; *see Hill v. Thompson*, 8 *Taunt.* 402. The defendant alone can call for a nonsuit, therefore where he does not appear, the plaintiff cannot be nonsuited, and the only way is, if the jury are sworn, to discharge them. *Arnold v. Johnson*, 1 *Str.* 267. Where there is judgment by default against one of two defendants, the plaintiff may be nonsuited, as against the other who has pleaded. *Murphy v. Donlan*, 5 *B. and C.* 178. So he may be nonsuited after payment of money into court; *Gutteridge v. Smith*, 2 *H. Bl.* 374, 1 *Campb.* 327, (*n*); or after a plea of tender. *Anderson v. Shaw*, 3 *Bingh.* 290.

Execution—certificate under 11 *G.* 4, *and* 1 *W.* 4, *c.* 70, *s.* 38, *Ejectment.*] By this statute it is enacted that "in all cases of trials of ejectments, at Nisi Prius, when a verdict shall be given for the plaintiff, or the plaintiff shall be nonsuited for want of the defendant's appearance, to confess lease, entry, and

ouster, it shall be lawful for the judge, before whom the cause shall be tried, to certify his opinion on the back of the record, that a writ of possession ought to issue immediately; and upon such certificate a writ of possession may be issued forthwith."

The 1 W. 4, c. 7, s. 6, as to speedy execution, does not affect the above clause. The judge has no discretion, under this section, as to the time within which execution shall issue, but he must either direct it to be immediate, or allow the case to take its regular course. *Doe dem. Williamson v. Dawson*, 4 *C. and P.* 589; *Doe dem. Packer v. Hilliard*, 5 *C. and P.* 132. Though where he is of opinion that some time ought to elapse before possession is taken, he will grant the certificate, on an undertaking by the lessor of the plaintiff not to enforce it before the expiration of a certain period. *Doe dem. Packer v. Hilliard*, 5 *C. and P.* 132. Where the plaintiff is nonsuited in consequence of the non-appearance of the defendant to confess, &c., an affidavit, stating the circumstances of the case, will be required by the judge before granting the certificate. 4 *C. and P.* 589.

Execution—certificate under statute 1 *Wm.* 4, *c.* 7, *s.* 2.] By this statute it is enacted that "in all actions to be brought in either of the said courts (his Majesty's courts of law at Westminster), by whatever form of process the same may be commenced, it shall be lawful for the judge, before whom any issue joined in such actions shall be to be tried, in case the plaintiff or demandant therein shall become nonsuit, or a verdict shall be given for the plaintiff or demandant, defendant or tenant, to certify under his hand, on the back of the record, at any time before the end of the sittings or assizes, that in his opinion execution ought to issue in such action forthwith, or at some day to be named in such certificate, and subject or not to any condition or qualification; and in case of a verdict for the plaintiff, then either for the whole or for any part of the sum found by such verdict; in all which cases, a rule for judgment may be given, costs taxed, and judgment signed forthwith, and execution may be issued forthwith, or afterwards, according to the terms of such certificate, on any day in vacation or term; and the *postea* with such certificate, as a part thereof, shall and may be entered of record, as of the day on which the judgment shall be signed, although the writ of *Distringas Juratores*, or *Habeas Corpora Juratorum*, may not be returnable until after such day. Provided always, that it shall be lawful for the party entitled to such judgment to postpone the signing thereof."

Affidavits have been admitted in support of an application for immediate execution. *Ruddick v. Simmons*, 1 *Moo. and*

Rob. 184. But in another case, Lord Lyndhurst rejected them. *Gervas v. Burtchley,* 1 *Moo. and Rob.* 150.

This certificate has been refused in several instances: in an action of debt on simple contract; *Ward v. Crocket,* 5 *C. and P.* 10; *Fisher v. Davies,* 1 *Moo. and Rob.* 93. But it was afterwards granted in that action by Parke, J., after consulting Bolland, B.; *Young v. Crooks,* 1 *Moo. and Rob.* 220; in an action for negligent driving; *Wright v. Guiver,* 5 *C. and P.* 9; *and see Barford v. Nelson,* 5 *C. and P.* 8; and in an action on a bill and note given for a public-house score. *Crookshank v. Rose,* 5 *C. and P.* 19. It has been granted after a verdict by consent, *Percival v. Alcock,* 1 *Moo. and Rob.* 167, and in trespass, Patteson, J., being of opinion that it was not confined to cases of contract. *Barden v. Cox,* 1 *Moo. and Rob.* 203.

In debt on bond, with *non est factum* pleaded, to secure the payment, by instalments, of the consideration for the purchase of a medical practice, the jury having found a verdict for the plaintiff, Alderson, B., refused to grant immediate execution. *D'Aranda v. Houston,* 6 *C. and P.* 511.

Demurrer to Evidence.

If a party wishes to withdraw from the jury the application of the law to the fact, and all consideration of what the law is upon the fact, he then demurs in law upon the evidence, and the precise operation of that demurrer is, to take from the jury and to refer to the judge the application of the law to the fact. *Per Eyre, C. J., Gibson v. Hunter,* 2 *H. Bl.* 206. On a demurrer to circumstantial evidence the party offering the evidence is not obliged to join in demurrer, unless the party demurring will distinctly admit upon the record every fact and every conclusion which the evidence offered conduces to prove. *Id.* 187. But where the evidence is certain, as where it consists of matter of record, or other matter in writing, the party offering the evidence may be compelled to join in demurrer or waive the evidence. *Id.* 206. The whole proceeding of a demurrer to evidence is under the control of the judge, before whom the trial is had, who may overrule the demurrer, upon which the party demurring may tender a bill of exceptions. *Id.* 208. Where a demurrer to evidence is admitted, it is usual for the court, or judge, to give orders to the associate to take a note of the testimony, which is signed by the counsel on both sides, and the demurrer is affixed to the *postea.* *Tidd,* 916. *B. N. P.* 313. The damages may be assessed either by the principal jury, conditionally, before they are discharged, or by another jury upon a writ of inquiry after the demurrer is determined, and it is said to be the most usual course, when there is a

demurrer to evidence, to discharge the jury without further inquiry. *Ibid.*

Bill of Exceptions.

A bill of exceptions lies upon some point of law, either in admitting or denying evidence, or a challenge, or some matter of law arising upon fact not denied, in which either party is overruled by the court. *B. N. P.* 316. If such bill be tendered, and the exceptions in it are truly stated, then the judge (by statute Westm. 2, 13 Ed. 1, c. 31,) ought to set his seal, in testimony that such exceptions were taken at the trial; but if the bill contain matters false, or untruly stated, or matters in which the party was not overruled, he is not obliged to affix his seal. *B. N. P.* 316. The bill of exceptions must be tendered at the trial, and the substance of it reduced into writing at the time. *Ibid. Tidd,* 912. As a bill of exceptions can only be argued on error, where a writ of error will not lie there can be no bill of exceptions. *Ibid; but see* 2 *Inst.* 427.

EVIDENCE IN PARTICULAR ACTIONS.

ASSUMPSIT ON SALE OF REAL PROPERTY.

Vendor against Vendee.

In an action of assumpsit by the vendor of real property, on the purchaser's default in completing the contract, the plaintiff must prove the contract, the performance, by himself, of all conditions precedent, and the defendant's default, where those facts are denied by the plea.

Proof of the contract.] It will be necessary to prove a contract in writing, for by the statute of frauds, 29 Car. 2, c. 3, s. 4, no action shall be brought, whereby to charge any person upon any contract, or sale, of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto, by him, lawfully authorised.

The note, or writing, must specify the terms, for otherwise all the danger of perjury, which the statute intended to guard against, would be let in. *Sugd. V. and P.* 76. Thus where an auctioneer's receipt for the deposit was set up as an agreement, it was rejected, because it did not state the price to be paid for the estate; *Blagden v. Bradbear*, 12 *Ves.* 466; but had the receipt referred to the conditions of sale, so as to have entitled the court to look at them for the terms, it might have been enforced as an agreement. *Ibid.* So if a letter, properly signed, does not contain the whole agreement, yet if it actually refer to a writing that does, it will be sufficient, though the latter writing is not signed; and parol evidence is admissible to show the *identity* of the writing referred to. *Clinan v. Cooke*, 1 *Sch. and Lef.* 22. *Allen v. Bennet*, 3 *Taunt.* 169; *see also Gordon v. Trevelyan*, 1 *Price*, 64, *Cooper v. Smith*, 15 *East*, 103, *Sugd. V. and P.* 76, *Richards v. Porter*, 6 *B. and C.* 437, *Smith v. Surman*, 9 *B. and C.* 561. The agreement cannot be enforced unless both the contracting parties are named in it. *Charlewood v. Duke of Bedford*, 1 *Atk.* 497. *Wheeler v. Collier*, *M. and M.* 123.

With regard to the signing, it has been held that a printed

name is sufficient, *Saunderson v. Jackson*, 2 *B. and P.* 238, (*on the* 17*th sec.*) if recognised by, or brought home to the party, as having been printed by his authority; *Schneider v. Norris*, 2 *Mau. and S.* 288, (*on the* 17*th sec.*) and it is immaterial in what part of the agreement the name is signed; *ibid. Knight v. Crockford*, 1 *Esp.* 190; but whether the writing of his name by the defendant, *in the body* of the instrument, for a particular purpose, (as stating a rent to be paid to himself,) be a sufficient signing, appears to be doubtful. *Stokes v. Moore*, 1 *Cox*, 219. *Cox's note to* 1 *P. Wms.* 771. *Sugd. V. and P.* 89. A signing *as witness* has been held sufficient, if the party signing is cognizant of the contents of the instrument. *Welford v. Beazely*, 3 *Atk.* 503. *Harding v. Crethorn*, 1 *Esp.* 58. But this doctrine has been doubted by Lord Denman, C. J., in a late case. *Gosbell v. Archer*, 4 *Nev. and M.* 492. In *Coles v. Trecothick*, 9 *Ves.* 234, Lord Eldon said, "where a *principal* or *person to be bound* signs (what he cannot be) as a witness, he cannot be understood to sign otherwise than as principal," and accordingly such party having signed, "witness E. P. for M. S., agent for the seller," this was held to bind the vendor. *Ibid.* But where the auctioneer's clerk signed the contract, "witness T. N.," without more, this was held not to be a signing by an agent of the party. *Gosbell v. Archer*, 4 *Nev. and M.* 485.

The statute requires the agreement to be signed by the *party to be charged therewith*, or some other person, thereunto, by him, lawfully authorised. It is good though only signed by the party to be charged, and not by the other party. *Seton v. Slade*, 7 *Ves.* 275; *and see the cases collected Sugd. V. and P.* 73; *see also Saunderson v. Jackson*, 2 *B. and P.* 238, (*on the* 17*th sec.*); *sed vide Wheeler v. Collier, M. and M.* 125. With regard to the person authorised by the party to sign, it is settled that such person need not be authorised in writing. *Coles v. Trecothick*, 9 *Ves.* 250. *Emmerson v. Heelis*, 2 *Taunt.* 48. A sale by auction is within the statute of frauds, and the auctioneer is the agent for both the vendor and vendee. *Kenworthy v. Schofield*, 2 *B. and C.* 947. The agent must be a third person, and not one of the parties; *Wright v. Dannah*, 2 *Campb.* 203; (*on the* 17*th sec.*;) and, therefore, if the action is brought against the purchaser, by the auctioneer himself, the signing of the defendant's name by the auctioneer will not be sufficient to satisfy the statute. *Farebrother v. Simmons*, 5 *B. and A.* 333, (*on the* 17*th sec.*) But the signature by the auctioneer's clerk, the auctioneer being present, is sufficient in an action by the auctioneer. *Bird v. Boulter*, 4 *B. and Ad.* 445, 1 *Nev. and M.* 313, *S. C.* Where an agent is authorised to sell at a particular price, his clerk in his absence cannot contract, without a special authority for that purpose. *Coles v. Trecothick*, 9 *Ves.* 234. *Henderson v. Barnewall*, 1 *Y. and*

J. 387. *Sugd. V. and P.* 91. A subsequent recognition of the authority of the agent by the principal is sufficient. *Maclean v. Dunn*, 4 *Bingh.* 722, 1 *Moore and P.* 761, *S. C.* *Gosbell v. Archer*, 4 *Nev. and M.* 492.

Performance of conditions precedent.] The plaintiff must be prepared to prove that he has performed all the conditions precedent stated in his declaration, and put in issue by the pleadings. Thus, where the plaintiff agreed to sell to the defendant a school-house, &c., and to convey the same to him, on or before the first of August, 1797, and to deliver up the possession to him on the twenty-fourth of June, 1796, and in consideration thereof the defendant agreed to pay the plaintiff 120*l.* on or before the first of August, 1797, it was held that the plaintiff could not maintain an action for the 120*l.*, without showing that he had conveyed, or tendered a conveyance to the defendant. *Glazebrook v. Woodrow*, 8 *T. R.* 366; *see the cases collected*, 1 *Saund.* 320, *a.*; 2 *Saund.* 352, *b* (*n*). But where the performance of a condition precedent has been dispensed with by the defendant, the plaintiff may aver such dispensation, as that he tendered a draft of the conveyance to the defendant, and offered to execute and deliver such conveyance to him, but that he discharged the plaintiff from executing the same. *Jones v. Barkley, Dougl.* 684. *Wilmot v. Wilkinson*, 6 *B. and C.* 506. Where by the terms of the contract the purchaser is to prepare the conveyance, the seller may bring an action for the purchase-money without tendering a conveyance; and it seems, that in the absence of any express stipulation, the purchaser is bound to prepare and tender the conveyance. *Baxter v. Lewis, Forest*, 61. *Sugd. V. and P.* 222; *but see the cases cited*, 3 *Stark. Ev.* 1609 (*n*), 1*st ed.*

The plaintiff must prove his title to the property sold, and if he produces his title deeds at the trial, in proof of his title, it seems that it will not be necessary for him to call the subscribing witnesses. *Thomson v. Miles*, 1 *Esp.* 185; *Sugd. V. and P.* 216; 2 *Phill. Ev.* 99; *but see Crosby v. Percy*, 1 *Campb.* 304, *contra.* Where the plaintiff sold *a lease*, and by the conditions of sale he was "not to produce any title prior to the lease," it was held that he was bound to prove the lease by calling the attesting witness. Bosanquet, J., said that it was not necessary to decide the point discussed in *Thomson v. Miles, and Crosby v. Percy*, which Parke, J., declared to be unsatisfactory. Tindal, C. J., put the case on the ground that the plaintiff, having declared that he was *possessed of a lease*, was bound to prove that allegation in the ordinary manner. *Laythoarp v. Bryant*, 1 *Bingh. N. C.* 421, 5 *Moore and S.* 327, *S. C.* If the purchaser has not made an application for the title before the commencement of the action, and no

time is fixed upon for completing the contract, it will be sufficient if the plaintiff can show a good title in himself at the time of trial. *Thomson v. Miles*, 1 *Esp.* 185; *see Wilde v. Fort*, 4 *Taunt.* 336; *Bartlett v. Tuchin*, 6 *Taunt.* 259.

Defence.

It is a good ground of defence, that an erroneous misstatement, or misdescription, has been wilfully introduced into the conditions of sale, to make the land appear more valuable. *Duke of Norfolk v. Worthy*, 1 *Campb.* 340; *and see Vernon v. Keys*, 12 *East*, 637. Where it was provided by the conditions of sale that "if any mistake should be made in the description of the premises, or if any other material error should appear in the particulars of sale, such mistake or error should not annul the sale, but a compensation should be made," the vendee was held not to be released from the contract by reason of a misdescription in the particulars of sale, obvious on inspection of the premises, unless such misdescription was wilful and designed. *Wright v. Wilson*, 1 *Moo. and Rob.* 207. Where a person is employed to bid, by the vendor, at the sale, not for the purpose of preventing a sale at an undervalue, but to take advantage of the eagerness of bidders to screw up the price, it seems that this will be deemed a fraud. *Smith v. Clarke*, 12 *Ves.* 483. *Sugd. V. and P.* 24. *Howard v. Castle*, 6 *T. R.* 642. *Crowder v. Austin*, 3 *Bingh.* 368. *Wheeler v. Collier*, *M. and M.* 126.

The result of the decisions on this question is thus stated by Tindal, C. J. "All the cases concur in this, that when the mis-statement is wilful or designed, it amounts to fraud, and such fraud upon general principles of law avoids the contract altogether. But with respect to mis-statements which stand clear of fraud it is impossible to reconcile all the cases; some of them laying it down that no mis-statements which originate in carelessness, however gross, shall avoid the contract, but shall form the subject of compensation only. *Duke of Norfolk v. Worthy* (*supra*), *Wright v. Wilson* (*supra*). Whilst other cases lay down the rule that a misdescription in a material point, although occasioned by negligence only, not by fraud, will vitiate the contract of sale. *Jones v. Edney*, 3 *Campb.* 285. *Waring v. Haggart*, *Ry. and Moo.* 40. *Stewart v. Alliston*, 1 *Merivale*, 27. In this state of discrepancy between the decided cases, we think it is at all events a safe rule to adopt, that when the misdescription, although not proceeding from fraud, is in a material and substantial point so far affecting the subject matter of the contract, that it may reasonably be supposed that but for such misdescription the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a

state of facts, the purchaser may be considered as not having purchased the thing which was really the subject of sale, as in *Jones v. Edney*, and which the subject matter was described to be "a free public-house," and the lease contained a proviso that the lessee and his assignees should take all their beer from a particular brewery, in which case the misdescription was held to be fatal." *Flight v. Booth*, 5 *Moore and S.* 190, 1 *Bingh. N. C.* 370, *S. C.*

The defendant may also insist upon a defect in the plaintiff's title, and it seems that a court of law will enter into equitable objections to a title. *Maberley v. Robins*, 5 *Taunt.* 625. *Elliot v. Edwards*, 3 *B. and P.* 181. *Sugd. V. and P.* 219; *but see Alpass v. Watkins*, 8 *T. R.* 516. *Romilly v. James*, 1 *Marsh.* 600. 2 *Phil. Ev.* 101; *see also R. v. Toddington*, 1 *B. and A.* 560. So the defendant may show that the plaintiff had an interest in the premises for a shorter term than he contracted to sell; *Farrer v. Nightingal*, 2 *Esp.* 639, *Hibbert v. Shee*, 1 *Campb.* 113; or that the premises are subjected to an incumbrance, or annual payment, of which no notice has been given. *Turner v. Beaurain*, *Sugd. V. and P.* 252. *Barnwell v. Harris*, 1 *Taunt.* 430. The purchaser may reject a questionable title, and therefore a purchaser of a lease under a contract, describing it as containing none but the usual covenants, is not bound to accept the assignment, if the lease contains an unusual covenant, though such covenant is probably bad in point of law. *Hartley v. Pehall*, *Peake*, 131; *see also Waring v. Hoggart*, *R. and M.* 39. Where a lease was sold by auction, and produced and read at that time, and amongst the premises demised was a summer-house, which had been pulled down before the sale, it was held that the purchaser was not bound to complete the contract, though no mention was made of the summer-house in the particulars of sale. *Granger v. Worms*, 4 *Campb.* 83. Where the property consisted of several parcels sold by auction in distinct lots, Lord Kenyon held that the vendor, having made out a title to a single lot only, the whole contract might be rescinded, considering the purchase of the several lots as having been made with a view to a joint concern, and that the contract, for the convenience and interest of the purchaser, must be understood to be one entire contract for the whole. *Chambers v. Griffith*, 1 *Esp.* 149; *but see Emmerson v. Heelis*, 2 *Taunt.* 38. *James v. Shore*, 1 *Stark.* 426, *supra*. *Sugd. V. and P.* 257, where it is said that *Chambers v. Griffith* cannot be maintained as an authority, unless it can be shown that there was an understanding that the purchaser was not to take any of the lots unless he could obtain them all; and this is said to have been the opinion of Lord Eldon. So in a late case it was held that where several lots are knocked down to a bidder at an auction, and his name marked against them in the catalogue, a distinct

contract arises on each lot. *Roots v. Lord Dormer*, 4 *B. and Ad.* 77. The purchaser may refuse to take a conveyance executed under a power of attorney, as it multiplies his proofs. *Coore v. Callaway*, 1 *Esp.* 116. *Richards v. Barton*, *Id.* 268.

Where a purchaser makes a proposal to purchase, and gives the vendor a certain time to consider it, he may within that time retract the offer. *Routledge v. Grant*, 4 *Bingh.* 662, *infra.*

Vendee against Vendor.

If the vendor refuses, or is unable to complete his contract, the purchaser may either declare specially on such contract, or in case he has made a deposit, or paid any part of the purchase-money, he may recover it in an action for money had and received. In the former action he will be entitled to recover the deposit, and also interest, and any expenses to which he may have been put in investigating the title, by way of special damage; in the latter he will be entitled to recover the purchase-money or deposit only. *Camfield v. Gilbert*, 4 *Esp.* 221. *Walker v. Constable*, 1 *B. and P.* 306. *Sugd. V. and P.* 213. In neither form of action can he recover compensation for the fancied goodness of his bargain, where the vendor is, without fraud, incapable of making a title. *Flureau v. Thornhill*, 2 *W. Bl.* 1078. *Bratt v. Ellis*, *Sugd. V. and P.* 40. *Walker v. Moore*, 10 *B. and C.* 416. In the above cited case of *Flureau v. Thornhill* the vendor offered to convey such title as he had, or to return the purchase-money with interest, circumstances which did not exist in the following case. A person who had contracted for the purchase of an estate, but had not obtained a conveyance, put up the estate for sale, in lots by auction, and engaged to make a good title by a certain day, which he was unable to do, as his vendor never made a conveyance to him; it was held that the purchaser of certain lots at the auction might, in an action for not making a good title, recover not only the expences which he had incurred, but also damages for the loss he had sustained by not having the contract carried into effect. *Hopkins v. Grazebrook*, 6 *B. and C.* 31. In this case the vendor was in fault, by representing himself to be the owner of the property, when in fact he was not so; (*see* 10 *B. and C.* 420;) by which it is distinguished from the case of *Walker v. Moore*, *supra.* The expences of investigating the title cannot be recovered under a count for money paid. *Camfield v. Gilbert*, 4 *Esp.* 221.

Special action on the contract.] In a special action on the contract by the purchaser, he must prove (if those facts be denied) the contract, *see ante p.* 175, the performance by himself of all conditions precedent, the defects of the vendor's title, and when he seeks to recover the deposit, the payment of such deposit. It

will not be enough to prove that the title has been deemed by conveyancers to be insufficient. *Camfield v. Gilbert*, 4 *Esp.* 221. The vendor must be prepared to make out a good title on the day on which the purchase is to be completed. If he delivers an abstract setting out a defective title, the purchaser may object to it, and when the abstract is delivered by the vendor, he must be able to verify it by the title deeds in his possession, and unless a good title is made out at the day fixed, the purchaser will be entitled to rescind the contract. *Cornish v. Rowley, Selw. N. P.* 170. *Berry v. Young*, 2 *Esp.* 640 (*n*). It was ruled by Lord Tenterden that the vendor of a lease is not bound to produce his lessor's title without an express stipulation to that effect. *George v. Pritchard, R. and M.* 417. But this decision has been since overruled, and it has been held by the Court of King's Bench, that, unless there be a stipulation to the contrary, there is in every contract for the sale of a lease an implied undertaking to make out the lessor's title to demise, as well as the title of the vendor. *Souter v. Drake*, 3 *Nev. and M.* 40. And where on a sale by auction of leasehold property, one of the conditions of sale was, "that the vendor should not be obliged to produce the lessor's title," the vendor having *aliunde* discovered certain defects in the lessor's title, it was held that notwithstanding the above condition, he was entitled to insist on those defects. *Shepheard v. Keatley*, 1 *Crom. M. and R.* 117, 4 *Tyr.* 571, *S. C.* The plaintiff may be compelled to give the defendant a particular of every matter of fact which he intends to rely upon at the trial, as having been the cause of his not being able to complete the purchase; *Collet v. Thompson*, 3 *B. and P.* 246; but if a particular has not been given the plaintiff will be at liberty to prove any infraction of the conditions of sale. *Squire v. Tod*, 1 *Campb.* 293; *see Todd v. Hoggart, M. and M.* 128, *post, p.* 183.

A payment of the deposit to the agent of the vendor is, in law, a payment to the principal, and in an action against the latter for the recovery of the money, it is immaterial whether it has actually been paid over to him or not. *Duke of Norfolk v. Worthy*, 1 *Campb.* 337. If the deposit has been paid to the auctioneer, an action for it will lie against him before payment over to his principal; *Burrough v. Skinner*, 5 *Burr.* 2639; *and see Edwards v. Hodding*, 5 *Taunt.* 815; and where an auctioneer signed a contract for the sale of a house in his own name, and received the deposit (his principal being present), and after the purchaser had left the room paid over the deposit to his principal, it was ruled by Lord Tenterden that the purchaser might, notwithstanding the payment over, maintain an action against the auctioneer for the deposit. *Gray v. Gutteridge*, 3 *C. and P.* 40. But it seems that interest on the deposit cannot be recovered from him, except under particular

circumstances, unless a demand for the repayment of the money has been made upon him. *Lee v. Munn*, 8 *Taunt.* 45. *Farquhar v. Farley*, 7 *Taunt.* 594. *Sugd. V. and P.* 487. See statute 3 and 4 W. 4, c. 42, s. 28, stated *post.* Where an auctioneer does not disclose the name of his principal, an action will lie against himself for damages on breach of contract. *Hanson v. Roberdeau*, *Peake*, 120; *and see Simon v. Motivos*, 3 *Burr.* 1921. *Owen v. Gooch*, 2 *Esp.* 567. Where the purchaser recovers the deposit only from the auctioneer, he may, in a special action against the vendor, recover interest, and the expences of investigating the title. *Farquhar v. Farley*, 7 *Taunt.* 592.

With regard to the damages it seems that the purchaser may recover from the vendor the deposit with interest, and the expenses of investigating the title. *Richards v. Barton*, 1 *Esp.* 268. *Turner v. Beaurain*, *Sugd. V. and P.* 214. *Farquhar v. Farley*, 7 *Taunt.* 592; *but see Wilde v. Forte*, 4 *Taunt*, 341. *Camfield v. Gilbert*, 4 *Esp.* 223. *Sugd. V. and P.* 488. But unless he can establish the contract of sale he cannot recover the expenses of investigating the title, or interest, (but as to the latter see statute 3 and 4 W. 4, c. 42. s. 28.) *Gosbell v. Archer*, 4 *Nev. and M.* 485. If the residue of the purchase-money has been lying ready, without any interest being made of it, it seems such interest cannot be recovered. *Sweetland v. Smith*, 1 *Crom. and M.* 585, 3 *Tyr.* 491, *S. C.*; *but see Sugd. V. and P.* 488. The purchaser cannot recover expenses incurred previously to entering into the contract, nor the expenses of a survey of the estate made before he knows whether the title is good, nor the expense of a conveyance drawn in anticipation, nor the extra costs of a chancery suit by the vendor in which he is defeated, nor losses sustained on the resale of stock for the farm. *Hodges v. Earl of Litchfield*, 1 *Bingh. N. C.* 492.

Money had and received to recover deposit.] In an action for money had and received to recover the deposit, or any portion of the purchase-money which may have been paid, the plaintiff must prove the contract, *ante p.* 175, the payment of the money, *supra*, and the defects in the vendor's title, *ante p.* 179.

To enable the purchaser to maintain this action the contract must be disaffirmed *ab initio.* If the purchaser has had an occupation of the premises under the contract, he has adopted the contract, and cannot disaffirm it afterwards by quitting the premises, as the parties cannot be put in the same situation in which they before stood. *Hunt v. Silk*, 5 *East*, 449. If the original contract be void, or if it be a parol agreement for the sale of lands, the purchaser can only recover his deposit in this form of action, since he cannot sue upon the special contract. *Walker v. Constable*, 1 *B. and P.* 306. In-

terest cannot be recovered under a count for money had and received. *Ibid.* *Tappenden v. Randall*, 2 *B. and P.* 472. *Marshall v. Poole*, 13 *East*, 100. Where the vendor was unable to complete his contract on the day, and it also appeared that the purchaser was not prepared to pay the purchase-money on that day, Best, C. J., held that the agreement was entirely vacated, and the purchaser entitled to recover his deposit. *Clarke v. King*, *R. and M.* 394. Although a purchaser be expressly required to tender a conveyance, yet if a bad title be produced, he may maintain an action for the recovery of his deposit without tendering a conveyance. *Lowndes v. Bray*, *Sugd. V. and P.* 223. So where the vendor has, by selling the estate, incapacitated himself from executing a conveyance to the purchaser, further trouble and expense on his part are unnecessary, and he may accordingly sustain an action without tendering a conveyance, or the purchase-money. *Knight v. Crockford*, 1 *Esp.* 189. *Sugd. V. and P.* 223. And if the vendor, when called upon for an abstract of his title, although before the time when the conveyance was to be made, appears to have no title, the vendee may rescind the contract. *Roper v. Coombes*, 6 *B. and C.* 535. If a material fact, affecting the title, is omitted in the conditions of sale, the vendee may rescind the contract, and recover the deposit. *Waring v. Hoggart*, *R. and M.* 39. The plaintiff cannot, at the trial, insist upon any objection which he might have taken, but neglected to take, at the time of rescinding the contract, and which might have been remedied if taken before. *Todd v Hoggart*, *M. and M.* 128.

ASSUMPSIT FOR USE AND OCCUPATION.

This action is grounded on stat. 11 G. 2, c. 19, s. 14, by which it is enacted, that it shall be lawful for landlords, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements, or hereditaments, held or occupied by the defendants, in an action on the case, for the use and occupation of what was so held or enjoyed; and if, on the trial of such action, any parol demise, or any agreement (not being by deed) whereon a certain rent was reserved, shall appear, the plaintiff shall not therefore be nonsuited, but may make use thereof as evidence of the quantum of damages to be recovered.—The plaintiff must prove his own title to sue (if denied), the defendant's occupation, and the amount of damages.

Plaintiff's title.] If the defendant has come in under the plaintiff, or has acknowledged his title, as by the payment of rent to him, he will not be permitted to impeach it at the trial; *Syllivan v. Stradling*, 1 *Wils.* 208. *Cooke v. Loxley*, 5 *T. R.*

4, *Phipps v. Sculthorpe*, 1 *B. and A.* 50; and it is not material in such case that the plaintiff should have the legal title; *Hull v. Vaughan*, 6 *Price*, 157; but unless the defendant came in under the plaintiff, or has recognised his title, the plaintiff can only recover rent from the time of the legal estate being vested in him. *Cobb v. Carpenter*, 2 *Campb.* 13 (*n*). There is a distinction between the case where a person has actually received possession from one who has no title, and the case where he has merely attorned by mistake to one who has no title; in the former case the tenant cannot (except under very special circumstances) dispute the title, in the latter he may. *Per Bayley, J., Cornish v. Searell*, 8 *B. and C.* 475. *Rogers v. Pitcher*, 6 *Taunt.* 202. *Gravenor v. Woodhouse*, 1 *Bingh.* 38; *and see the cases cited infra, and in "Replevin," "Evidence on plea of non demisit or non tenuit."* Thus where a tenant took premises from "A. and B., for and on behalf of the trustees of the joint estate of C. and D." and it appeared at the trial on the evidence of the plaintiffs, (who described themselves in the declaration as joint trustees,) that they were trustees of C. only, it was held that the tenant was estopped from taking advantage of this variance. *Fleming v. Gooding*, 10 *Bingh.* 549, 4 *Moore and S.* 455, *S. C.* So where A. hired apartments by the year from B., and B. afterwards let the entire house to C., who sued A. for use and occupation, it was held that A. could not impeach C.'s title; *Rennie v. Robinson*, 1 *Bingh.* 147; but where land belonging to a parish was occupied by A., and he paid rent to the churchwardens, who executed a lease of the same land for a term of years to B., and gave A. notice of the lease, in an action for use and occupation by B. against A., it was held that A. was not estopped, by having paid rent to the churchwardens, from disputing B.'s title, and that B. could not derive a valid title from the churchwardens. *Phillips v. Pearce*, 5 *B. and C.* 433.

In general the title of the plaintiff is established by the production of the lease or agreement, which is proved in the usual manner, by calling the attesting witness; but if there be no actual lease or agreement, the plaintiff's title may be established by evidence of the defendant having paid rent to him, or submitted to a distress by him. *Panton v. Jones*, 3 *Campb.* 372. Notice to produce the receipts for rent, and the notice of distress, should in such cases be given. Evidence of payment of rent by third persons, under whom the defendant does not claim, is evidence of the plaintiff's title. *Doe v. Stacey*, 6 *C. and P.* 139. If it appears that the defendant holds under a written agreement not produced, or which when produced cannot be read for want of a stamp, the plaintiff will not be allowed to give parol evidence of the holding, and must be nonsuited. *Brewer v. Palmer*, 3 *Esp.* 213. *Ramsbottom v. Mortley*, 2 *Mau. and S.* 445.

Defendant's occupation.] It is *primâ facie* sufficient for the plaintiff to prove that the defendant occupied the premises, and the continuance of the occupation will be presumed till the contrary appear. *Harland v. Bromley*, 1 *Stark.* 455. *Ward v. Mason*, 9 *Price*, 291. It is not necessary for the plaintiff to prove a personal occupation of the premises by the defendant; an occupation which the defendant might have had, if he had not voluntarily abstained from it, is sufficient; *Per Gibbs, C. J., Whitehead v. Clifford*, 5 *Taunt.* 519; *Pinero v. Judson*, 6 *Bingh.* 206; and if A. agree to let lands to B., who permits C. to occupy them, B. may be sued for use and occupation. *Bull v. Sibbs*, 8 *T. R.* 327; *and see Dingley v. Angrove*, 2 *Smith*, 18. *Conolly v. Baxter*, 2 *Stark.* 527. Receiving the rents and profits from an under tenant is proof of use and occupation by the person receiving them. *Neal v. Swind*, 2 *C. and J.* 377. So a tenant who has quitted in pursuance of a parol license from his landlord, and without having given a notice to quit, remains liable; *Mollett v. Brayne*, 2 *Campb.* 104; *and see Matthews v. Sewell*, 8 *Taunt.* 270, *Thomson v. Wilson*, 2 *Stark.* 379; *Johnstone v. Hudlestone*, 4 *B. and C.* 922, even though the landlord, on the tenant's quitting, puts up a bill in the window for the purpose of having the premises let; *Redpath v. Roberts*, 3 *Esp.* 225; *see Johnstone v. Hudlestone*, 4 *B. and C.* 922, unless the landlord has accepted a third person as tenant, which operates as a surrender in law of the first tenant's term. *Thomas v. Cook*, 2 *B. and A.* 119. In order to make out a surrender it must appear that the landlord has given up his old tenant and accepted a new one. W. and H., by agreement in March, 1827, became tenants to the plaintiff of premises occupied by them as partners, with the power to them to extend the term to seven years, by giving the plaintiff a notice to that effect. In January 1829, W. and H. gave notice accordingly, though in Midsummer 1828, W. had retired from the partnership. In January 1829, H. entered into partnership with S., and they carried on the business under the firm of H. and S. until 1831. The plaintiff gave receipts for the rent, as received from H. after W. retired, and as from H. and S. after S. became partner. In February 1829, the plaintiff gave to H. a letter to his (plaintiff's) attorney, signifying that a lease might be made to H. and S., but this letter was kept by H., and not acted upon, and no lease was prepared. It was held, that the plaintiff had not given up W. as his tenant, that there was no substitution of any new person as tenant, and that consequently, W. remained liable for rent accruing in 1831. *Graham v. Whichelo*, 1 *Crom. and M.* 188. A., the tenant of a house, three cottages, and a stable and yard, let at an entire rent, for a term of seven years, before the expiration of the term, assigned all the premises to B. for the remainder of the term, the house and cottages being

in the possession of under-tenants, and the stable and yard in that of A. The landlord accepted a sum of money as rent up to the day of the assignment, which was in the middle of a quarter. B. took possession of the stable and yard only. The occupiers of the cottages having left them after the assignment and before the expiration of the term, the landlord re-let them. A. paid no rent after the assignment, but the landlord received rent from the under-tenants. Before the expiration of the term, the landlord advertised the whole of the premises to be let or sold. It was held, that this was a surrender by operation of law of all the premises. *Reeve v. Bird*, 1 *Crom. M. and R.* 31, 4 *Tyr.* 612, *S. C.* Where a tenant from year to year, at a rent payable half-yearly, quitted without giving a notice to quit, and the landlord, before the expiration of the next half-year, let the premises to another tenant, it was held that the landlord was not entitled to recover rent from the first tenant, from the expiration of the current year when he quitted the premises, to the time when the landlord re-let the same to the second tenant. *Hall v. Burgess*, 5 *B. and C.* 332; *and see Walls v. Atcheson*, 3 *Bingh.* 462. And in such case, if the tenant quit in the middle of a quarter, the landlord cannot recover rent *pro ratâ*, for the portion of the quarter during which the tenant occupied. *Grimman v. Legge*, 8 *B. and C.* 324. Where the tenant pays up to a certain quarter, and a third person afterwards comes into possession, and pays rent at irregular periods, a jury may presume that the landlord has accepted the latter as his tenant. *Woodcock v. Nuth*, 8 *Bingh.* 170. If the landlord has himself determined the occupation by accepting the key of the house, and the rent is, by the agreement, to cease on quitting possession, he cannot recover in this action. *Whitehead v. Clifford*, 5 *Taunt.* 518. Although the premises are burnt down, and remain unoccupied, the tenant still continues liable for the rent subsequently accruing. *Baker v. Holtpzaffell*, 4 *Taunt.* 45.

Before the late bankrupt act it was held that assumpsit for use and occupation lay against a lessee, upon his agreement to pay rent during the tenancy, notwithstanding his bankruptcy and the occupation of the assignees during part of the time for which the rent accrued; *Boot v. Wilson*, 8 *East*, 311; but now, by 6 Geo. 4, c. 16, s. 75, any bankrupt entitled to any lease, or agreement for a lease, if the assignees accept the same, shall not be liable to pay any rent accruing after the date of the commission, or to be sued in respect of any subsequent non-observance or non-performance of the conditions, covenants, or agreements therein contained; and if the assignees decline the same, shall not be liable as aforesaid, in case he deliver up such lease or agreement to the lessor, or such person agreeing to grant a lease, within fourteen days after he shall have had notice that the assignees shall have declined, as aforesaid.—

Where assignees entered and occupied premises in the middle of a year, it was held that use and occupation could not be maintained against them for the bankrupt's occupation as well as their own, without proving that the bankrupt's occupation was at their request. *Naish v. Tatlock*, 2 *H. Bl.* 319; *but see Gibson v. Courthope*, 1 *D. and R.* 205. So a husband is not liable for the occupation of a house by his wife, *dum sola. Richardson v. Hall*, 1 *B. and B.* 50. The insolvent act, 7 G. 4, c. 57, contains a clause (23) similar to that in the bankrupt act.

Where one of two executors of a deceased tenant for years, enters into the premises, such entry does not enure as the entry of both so as to make them both liable in an action for use and occupation. *Nation v. Tozer*, 1 *Crom. M. and R.* 172, 4 *Tyr.* 561, *S. C.*

If, after the determination of a lease, the tenant holds over and pays rent, such payment is conclusive evidence of a tenancy; and he will be liable in an action for use and occupation for the time he occupies the premises. *Bishop v. Howard*, 2 *B. and C.* 100; *and see post, in "Ejectment."* An executor of a tenant from year to year, holding on and paying rent, will hold on the terms of the former demise, and be personally liable. *Buckworth v. Simpson*, 1 *Crom. M. and R.* 834. But where a tenant from year to year, on the expiration of his landlord's title, continues in possession for one quarter, and pays rent for that quarter to the party entitled, but quits at the end of the quarter, the payment is not evidence of a tenancy for more than the quarter, and the party entitled cannot sue the tenant for use and occupation beyond the quarter. *Freeman v. Jury*, *M. and M.* 19; *see* 1 *Moo. and Rob.* 215; *sed vide Woodcock v. Nuth*, 8 *Bingh.* 170.

Where the defendant has entered under a contract for sale, which ultimately goes off, and his occupation has been a beneficial one, it seems that he is liable in this action, though it is otherwise when the occupation has not been beneficial; *Hearn v. Tomlin*, *Peake*, 192; or when the plaintiff has derived a sufficient benefit by the contract, as where he retained the purchase-money during the whole time of the occupation. *Kirtland v. Pounsett*, 2 *Taunt.* 145. Where the defendant contracted to sell the premises, but subsequently gained possession of them by a false representation, he was held liable during such possession for use and occupation, though at that time he was the legal owner of the freehold. *Hull v. Vaughan*, 6 *Price*, 157; *see also Keating v. Bulkely*, 2 *Stark.* 419. Whether the owner of land can bring use and occupation against a trespasser, waiving the tort, appears to be doubtful. *See Hambly v. Trott*, *Cowp.* 375; *Birch v. Wright*, 1 *T. R.* 387; *Foster v. Stewart*, 3 *Mau. and S.* 199; *Bennett v. Francis*, 2 *B. and P.* 554.

Situation of the premises.] The local situation of the premises need not be stated; but if stated, and described as situate in a wrong parish, it is a fatal variance; *Wilson v. Clark*, 1 *Esp.* 273; *Guest v. Caumout*, 3 *Camph.* 235; but where they were described as situate in the parish of *Lambeth*, the real name of the parish being *St. Mary, Lambeth*, though usually called Lambeth, the variance was held immaterial. *Kirtland v. Pounsett*, 1 *Taunt.* 570; *see Goodtitle v. Walter*, 4 *Taunt.* 672, where it is said to be sufficient to describe premises as lying in any parish by the name by which the parish is ordinarily known; *but see Taylor v. Hooman*, 1 *B. Moore*, 161; *and see post, in "Ejectment:" see also Taylor v. Willans*, 3 *Bingh.* 449, *Doe v. Carter*, 1 *Y. and J.* 492.

Damages.] Where a rent is mentioned in the lease or agreement, such rent will be the measure of damages, though the lease be void by the statute of frauds; *De Medina v. Polson*, *Holt*, 47; but where there is no express agreement as to rent, the value of the premises must be proved; and where A. took a farm under an agreement which he never signed, and the material terms of which the lessor failed to fulfil, so that the defendant had not the occupation of all the land stipulated for, it was held that the jury might ascertain the value of the land, without regarding the amount of rent reserved by the agreement. *Tomlinson v. Day*, 2 *B. and B.* 680, 5 *B. Moore*, 558, *S. C.*

Defence.

Plaintiff's title expired.] Although the defendant cannot impeach the title of the plaintiff under whom he holds; *ante p.* 183; yet he may show that it has expired; *Holmes v. Pontin*, *Peake*, 99; *Morgan v. Ambrose*, *Peake's Ev.* 277; *Gravenor v. Woodhouse*, 1 *Bingh.* 43; but where the defendant had come in under the plaintiff, Lord Ellenborough held that it was not competent for him to show that the plaintiff's title had expired, unless he had at the same time solemnly renounced the plaintiff's title, and commenced a fresh holding under another person. *Balls v. Westwood*, 2 *Camph.* 11; *and see Neave v. Moss*, 1 *Bingh.* 360; *and post, "Replevin," "Evidence on plea of Non Demisit, &c."*

In an action by the assignee of a reversion, it is a good defence that the defendant paid the rent to the lessor before notice of the assignment. *Birch v. Wright*, 1 *T. R.* 378; *and see Lumley v. Hodgson*, 16 *East*, 99; *Moss v. Gallimore*, *Dougl.* 282.

Defendant's Occupation determined.] An agreement that on the tenant's quitting the rent shall cease, and an acceptance of the key by the landlord or a letting of the premises by him

to a third person is, as already stated, *ante p.* 186, a sufficient defence; *Whitehead v. Clifford*, 5 *Taunt.* 518; *Hall v. Burgess*, 5 *B. and C.* 332; *Grimman v. Legge*, 8 *B. and C.* 324; *Walls v. Atcheson*, 3 *Bingh.* 462, *stated ante p.* 185; but evidence that the keys of the premises were delivered by an agent of the defendant to a servant at the plaintiff's house, and that the plaintiff declared that they had been lost or mislaid, is not sufficient. *Harland v. Bromley*, 1 *Stark.* 455. An eviction by the landlord determines the occupation; and where the premises are let at an entire rent, an eviction from some part, if the tenant gives up possession of the residue, is a complete defence; *Smith v. Raleigh*, 3 *Campb.* 513; but if the tenant continues in possession of the residue, he seems liable *pro tanto*: *Stokes v. Cooper*, 3 *Campb.* 514 (*n*); and an eviction of the under-tenant is an eviction of the tenant. *Burn v. Phelps*, 1 *Stark.* 94. When the landlord lets 100 acres, and has previously let ten of them to another person, this is not an eviction by the landlord as to the ten acres, but the rent is apportioned. *Neale v. Mackenzie*, 2 *Crom. M. and R.* 84. Where the defendant proved that he took possession as administrator, and that the premises had been productive of no profit to him, and that eight months after the intestate's death he had offered to surrender them to the plaintiff, this was held a good defence. *Remnant v. Bremridge*, 8 *Taunt.* 191. It is also a good defence that the defendant has had no beneficial use and occupation, through the default of the plaintiff, as where the premises become unsafe and useless for want of repairs, the tenant not being bound to repair; in which case he is not liable in this action, though he has given no notice to quit. *Edwards v. Etherington*, *R. and M.* 268. And though the tenant be bound to repair, yet if the premises become unwholesome for want of sufficient drainage, and cannot be repaired without extravagant and unreasonable expense, he may quit without giving notice. *Collins v. Barrow*, 1 *Moo. and Rob.* 112.

Defendant treated by plaintiff as a trespasser.] If the landlord has treated the tenant as a trespasser, he cannot afterwards recover against him in this action. Thus if he has *recovered* against him in ejectment, he cannot sue, in this action, for the rent accruing *after* the day of the demise. *Birch v. Wright*, 1 *T. R.* 378. *See Bridges v. Smyth*, 5 *Bingh.* 410. But the mere *bringing* of an ejectment, and laying the demise before the time of the rent accruing, is no bar to an action for use and occupation. *Cobb v. Carpenter*, 2 *Campb.* 13 (*n*).

Statute of limitations.] The statute of limitations is a good defence, in an action against a person who has been tenant from year to year, but who has not within the last six years occupied the premises, paid rent, or done any act from which

a tenancy can be inferred, though no notice to quit has been given. *Leigh v. Thornton*, 1 *B. and A.* 625.

Illegality.] It is a good defence that the premises have been occupied for an immoral purpose, with the plaintiff's knowledge. *Crisp v. Churchill, cited* 1 *B. and P.* 340., *and see Girardy v. Richardson*, 1 *Esp.* 13 ; *Jennings v. Throgmorton, R. and M.* 251 ; *and see post "Assumpsit," "Defence," "Immorality."*

Distress.] It seems to be no defence that the landlord has distrained goods to the full value of the rent, if he has sold them for a less sum. If he has sold them at too low a rate the tenant's remedy is by action; *Efford v. Burgess*, 1 *Moo. and Rob.* 23 ; and it is no defence that the tenant quitted without giving notice, in consequence of fearing a distress on the part of the superior landlord. *Rechett v. Tullick*, 6 *C. and P.* 66.

ASSUMPSIT ON BILLS OF EXCHANGE.

Production and proof of the Bill.] In all actions upon bills of exchange and promissory notes, it is necessary for the plaintiff to produce the bill or note, and to show that it is the same as that on which he has declared. But where it appears that the instrument has been destroyed, as where the defendant tore his own note of hand, a copy is admissible. *Anon.* 1 *Ld. Raym.* 731. The plaintiff cannot recover on a lost bill, indorsed by the payee, without proving that it has been destroyed, though he has offered an indemnity to the defendant; *Pearson v. Hutchison*, 2 *Campb.* 211, 6 *Esp.* 126, *S. C. Hansard v. Robinson*, 7 *B. and C.* 90, *R. and M.* 404 (*n*), *S. C.*; and though the bill was lost after it became due; *Poole v. Smith, Holt*, 144, *Hansard v. Robinson, ubi sup.*; and an express promise to pay the lost bill will not entitle him to recover. *Davis v. Dodd*, 4 *Taunt.* 602. But where a bill is lost, with only a special indorsement upon it by the payee, the indorser may recover upon it, for the holder can make no title to it. *Long v. Bailie*, 2 *Campb.* 214 (*n*) ; *and see Smith v. Clarke, Peake*, 225. If the acceptor improperly detains the bill in his hands, the drawer or other party may sue him upon it, and give him notice to produce it ; *Smith v. M'Clure*, 5 *East*, 477; and where the defendant had admitted that he owed the money due upon a bill, which was in his own possession, Abbott, C. J., held that such admission might be given in evidence, under the common counts, without a notice to produce the bill. *Fryer v. Brown, R. and M.* 145.

The bill or note produced must appear to be the same upon

which the plaintiff has declared, and if any material variance exist, it will be fatal. Where a bill appears to be altered, it lies upon the party producing it to show that the alteration was not improperly made. *Henman v. Dickinson*, 5 *Bingh.* 183.

A party suing on a bill may recover part of the amount as trustee. A bill of exchange for 300*l.* being sent to A. to get it discounted, a banking company advanced 100*l.* on the bill, upon A. giving the company his guarantee for the amount so advanced. A. had no other interest in the bill. In an action by A. on the bill, it was held that he was entitled to recover the whole amount, and not merely the amount for which he gave his guarantee. *Reid v. Furnival*, 1 *Crom. and M.* 538.

Variance in names.] A variance in the names of the parties to the action was formerly a ground of a plea in abatement, provided the identity was proved, as where the plaintiff was called Edward instead of Edmund; *Broughton v. Frere*, 3 *Campb.* 29; *but now see* 3 *and* 4 *W.* 4, *c.* 42, *s.* 11; so of a misnomer in the surname of plaintiff; *Jowett v. Charnock*, 6 *M. and S.* 45; and where the plaintiff is misnamed in a note, he may show by evidence that he was the person intended. *Willis v. Barrett*, 2 *Stark.* 29. Where a bill is drawn with the payee's name in blank, and in the declaration it is stated that A. B. (a *bonâ fide* holder who has inserted his own name) was payee, it is no variance. *Atwood v. Griffin, Ry. and Moo.* 425. A variance in the christian name of the defendant is not material, if it appear that he has been served with process. *Dickenson v. Bowes*, 16 *East*, 110. But where, in an action against three makers of a note, the declaration stated it to have been made by William Austin, *Robert* Strobell, and William *Shutliffe*, of whom the two latter were outlawed, and it appeared that the names were William Austin, *Samuel* Strobell, and William *Shirtliffe*, the variance was held fatal. No proof was given of the identity of the parties. *Gordon v. Austin T. R.* 611. Where the misnomer is in the name of a person not a party to the action, and could not therefore be pleaded in abatement, it is fatal; as John *Crouch* for John *Couch*. *Whitwell v. Bennett*, 3 *B. and P.* 559. But where a bill was stated to have been indorsed by Philip Phillip, and it appeared that his name was Philip Phillips, and that he had so indorsed the bill, Lord Ellenborough refused to nonsuit, observing that whether the name on the bill be the party's false or true name is immaterial, if it be his name of trade, and that the only question was as to the identity of the person. *Forman v. Jacob*, 1 *Stark.* 47. Proof that other persons joined the defendant in drawing, or accepting the bill, is immaterial under the general issue, it being matter of plea in abatement. *Mountstephen v. Brooke*, 1 *B. and A.* 224; *see ante p.* 58.

As to variance in the date of the bill or note, *vide ante p.* 67.

Variance in place of payment.] If a bill is drawn (in the body of it), payable at a particular place, it is a fatal variance to state it without that qualification. *Bayley on bills*, 310. So where a bill is directed to "A. B. payable in London," at the foot, payment in London is part of the contract, and the omission of the qualification would be fatal. *Hodge v. Fillis*, 3 *Campb.* 463. And where a note contains, in the body of it, a promise to pay at a particular place, it is a variance to omit the place; *Roche v. Campbell*, 3 *Campb.* 247, *Sanderson v. Bowes*, 14 *East*, 500; but where the place of payment is only mentioned in the memorandum at the *foot* of a note, it is no variance to omit it; *Price v. Mitchell*, 4 *Campb.* 200; *Williams v. Waring*, 10 *B. and C.* 2; and if stated in the declaration to be made payable there, it is a variance. *Exon v. Russell*, 4 *Mau. and S.* 505; *but see Hardy v. Woodroofe*, 2 *Stark.* 319. *Sproule v. Legg*, 3 *Stark.* 157, *semb. cont.* Where the memorandum at the foot of the note was printed, Lord Ellenborough considered the place of payment there mentioned to be part of the contract. *Trecothick v. Edwin*, 1 *Stark.* 468. By stat. 1 and 2 Geo. 4, c. 78, if a person shall accept a bill payable at the house of a banker, or other place, without further expression, it shall be taken to be a general acceptance; but if he express that he accepts it at a banker's, or other place, and not otherwise or elsewhere, such acceptance shall be taken to be a special acceptance. *See Selby v. Eden*, 3 *Bingh.* 611. *Fayle v. Bird*, 6 *B. and C.* 531; *post.*

Variance in direction.] An allegation that the bill was directed to the defendant, is not supported by proof that the drawer drew the bill to his own order, payable at a specified place, though the defendant has accepted it. *Gray v. Milner*, 2 *Stark.* 336; *see* 3 *B. Moore*, 90, 8 *Taunt.* 739, *S. C., second action on same bill.* In an action against the acceptor, upon a bill directed to him, or, in his absence, to J. S., the conditional direction to J. S. need not be stated, *Anon.* 12 *Mod.* 447. *Bayley on bills*, 309.

Variance in consideration.] The words, "value received," in a bill payable to the drawer's order, mean value received by the *drawee;* and if stated to be value received by the *drawer*, it is a variance. *Highmore v. Primrose*, 5 *Mau. and S.* 65. *Priddy v. Henbrey*, 1 *B. and C.* 675. But where the bill is drawn payable to the order of a third person, "for value received," "it is no variance to state that it was for value received of the drawer. *Grant v. Da Costa*, 3 *Mau. and S.* 351. "Value received" in a note, imports value received from the

payee. *Clayton v. Gosling*, 5 *B. and C.* 360. Value *received* in leather, for value *delivered* in leather, is no variance. *Jones v. Mars*, 2 *Campb.* 306.

Variance in statement of currency.] Where the declaration on a bill drawn in Ireland stated that it was drawn for a certain sum, without stating it to be Irish currency, which it was in fact, the variance was held fatal. *Kearney v. King*, 2 *B. and A.* 301. *Sprowle v. Legge*, 1 *B. and C.* 16.

Variance in proof of the drawing, accepting, or indorsing.] Where the declaration stated that A. indorsed a note, *his own handwriting* being thereunto subscribed, and it appeared to have been indorsed by procuration, it was held a variance; *Levy v. Wilson*, 5 *Esp.* 180; but in a similar case, where it appeared that the name was written by the wife of the indorser, under his authority, Lord Ellenborough was inclined to think it enough to show the name written by an authorised agent; *Helmsley v. Loader*, 2 *Campb.* 450; and where the declaration stated that the defendants made their bill, "their own proper hands being thereunto subscribed," and the bill appeared to be drawn in the defendants' firm of "Mars and Co." Lord Ellenborough refused to nonsuit for the variance. *Jones v. Mars*, 2 *Campb.* 305. So where the averment was, as in the above case, but it appeared that the name was written by the son of the party with his authority, Lord Tenterden held it to be no variance. *Booth v. Grove*, *M. and M.* 182. Where it was stated that a bill was drawn, which was *afterwards* accepted by the defendant, and it appeared that the acceptance was written before the drawing, the variance was held immaterial. *Molloy v. Delves*, 7 *Bingh.* 428. A note, made by A. only, cannot be declared on as the joint note of A. and B., though given to secure a debt for which A. and B. were jointly liable. *Siffkin v. Walker*, 2 *Campb.* 308.

Variance in presentment.] A variance in the day of presentment is not material, in an action *against the acceptor*, on a bill payable a given time after sight; *Forman v. Jacob*, 1 *Stark.* 46; but where the time of payment depends upon the presentment, and the action is against the *drawer* of a bill, or *indorser* of a bill or note, the very day of the presentment ought to be stated. *Bayley on bills*, 317. However, where the averment is that the bill was presented *when it became due and payable*, to wit, on &c., it is not necessary to prove the exact day laid under the *videlicet*, and therefore if it be a Sunday, it is immaterial. *Bynner v. Russell*, 1 *Bingh.* 23, 7 *B. Moore*, 286, *S. C.* And if a presentment by a certain person is alleged, a presentment by another may be proved. *Boehm v. Campbell*, 1 *Gow*, 55.

If the word "at" be inserted before the name of the drawee, it is no variance to state that the bill was drawn on the drawee. *Shuttleworth v. Stephens,* 1 *Campb.* 407; *and see Russ. and Ry. C. C. R.* 511, *Allan v. Mawson,* 4 *Campb.* 115. Where an instrument was in this form, "Three months after date I promise to pay, &c.

"J. B. Grutherot, John Bury.
"35, Montague-place, (Indorsed) John Bury."

It was held, that the holder might treat this as a promissory note, or (*Per Ld. Tenterden, Bayley, and Holroyd, J. J.*) as a bill of exchange, at his election. *Edis v. Bury,* 6 *B. and C.* 433.

Payee against Acceptor.

The plaintiff must produce the bill and prove the acceptance by the defendant (if denied), and if such acceptance is conditional, that the condition has been performed.

Acceptance in writing or parol.] By stat. 1 and 2 Geo. 4, c. 78, no acceptance of any *inland* bill of exchange shall be sufficient to charge any person, unless the acceptance be in writing on the bill, or if there be more than one part of the bill, on one of the parts. It seems that the word "accepted" written on the bill is sufficient without the acceptor's signature, within the statute. *Dufaur v. Oxenden,* 1 *Moo. and Rob.* 90. An acceptance in blank, the bill being afterwards drawn in pursuance of the acceptor's authority, is good. *Leslie v. Hastings,* 1 *Moo. and Rob.* 119. But in the case of foreign bills, a parol acceptance, or an acceptance by a collateral writing, is still sufficient. A letter, stating that such a bill "shall meet with due honour," is an acceptance; *Clarke v. Cock,* 4 *East,* 57; or that the holder "may rest satisfied as to payment." *Wilkinson v. Lutwidge,* 1 *Str.* 649; *see also Wynne v. Raikes,* 5 *East,* 514. "What! not accepted? We have had the money, and they ought to be paid; but I do not interfere in this business, you should see my partner," was held to be an acceptance. *Fairlee v. Herring,* 3 *Bingh.* 625. The drawer of certain foreign bills being arrested, said "that he would have accepted them when presented, but he had not the funds from France, and that when he got the funds he would have paid them, but for some expressions of the indorsee," adding, that he told the clerk of the indorsee, that when he got the funds from France the bills should be paid. This was held to be a good conditional acceptance, and it appearing that he had got the funds from France, he was held liable. *Mendizabel v. Machado,* 6 *C. and P.* 218, 3 *Moore and S.* 831, *S. C.* So "this I accept, and you may call for it when you like," *Canipa v. Larios,* 2 *Knapp,* 276. "Your bill shall have at-

tention," is not an acceptance; *Rees v. Warwick*, 2 *B. and A.* 113; and a promise to pay a non-existing bill is no acceptance; *Johnson v. Collings*, 1 *East*, 98; unless perhaps some person be thereby induced to take or retain the bill when drawn. *Ibid. Pillans v. Van Mierop, Burr.* 1663. *Pierson v. Dunlop, Cowp.* 571. *Bayley on bills*, 144.

Acceptance, absolute or conditional.] If the acceptance is conditional, a performance of the condition must be alleged and proved (if denied); *Swan v. Cox*, 1 *Marsh.* 176; or if the condition has not been performed, a legal excuse must be averred and proved.

Acceptance, general or special.] An acceptance at a banker's or other place is only a general acceptance, but an acceptance at a banker's or other place *only, and not otherwise, or elsewhere,* is a qualified acceptance, and a presentment of the bill there must be stated and proved. 1 and 2 Geo. 4, c. 78. A bill which is drawn payable at a particular place, is within this statute, and unless the acceptance is a special one within the act, it is not necessary as against the acceptor to aver or prove a presentment at the particular place, it being held that there is no distinction between the case where the bill is so rendered payable by the language of the drawer, and the case where it is accepted so payable by the language of the acceptor. *Selby v. Eden*, 3 *Bingh.* 611. *Fayle v. Bird*, 6 *B. and C.* 531. But it is otherwise in an action against the drawer. *Gibb v. Mather*, 8 *Bing.* 214, 2 *C. and J.* 254, *S. C. post.* In the case of a general acceptance, it is not necessary to aver or prove a presentment; *Turner v. Hayden*, 4 *B. and C.* 1; but if the acceptance is qualified, the plaintiff must aver and prove presentment at the place named; *Rowe v. Young*, 2 *B. and B.* 165; though in the latter case notice of non-payment at the particular place, to the acceptor, is unnecessary. *Treacher v. Hinton*, 4 *B. and A.* 413. The holder need not present a bill, specially accepted, at the place named, on the very day it becomes due, provided the money is not lost by such neglect. *Rhodes v. Gent*, 5 *B. and A.* 244. And where, since the statute 1 and 2 Geo. 4, c. 78, a bill is accepted payable at a banker's, without saying, "and not otherwise or elsewhere," which is a general acceptance, and the holder neglects to present it, and the bankers fail with money of the acceptor in their hands, the acceptor is not thereby discharged. *Turner v. Hayden*, 4 *B. and C.* 1.

Acceptance, how proved.] The general issue not being pleadable since the new rules, the acceptance unless specially traversed is admitted. Where traversed, the acceptance, if written, is proved by evidence of the acceptor's handwriting,

and if there is an attesting witness, by calling him. If several, not partners, are acceptors, the handwriting of each must be proved. *Gray v. Palmers*, 1 *Esp.* 135. If one of several partners accept a bill drawn on the firm, it is sufficient to prove the partnership, and his handwriting, in an action against all; *Mason v. Rumsey*, 1 *Campb.* 384; but it is a good defence that the plaintiff had notice, that the firm would not be bound by such an acceptance, *Gallway v. Mathew*, 10 *East*, 264, or that the bill was not accepted for partnership purposes, and that there is covin between the partner who accepts and the plaintiff. *Shirreff v. Wilks*, 1 *East*, 48. *Green v. Deakin*, 2 *Stark.* 347. But in the absence of fraud or collusion a party who has received a bill, given by one of several partners in the name of the firm for his separate debt, may sue the partnership on such bill. *Swan v. Steele*, 7 *East*, 210. *Ridley v. Taylor*, 13 *East*, 175. *Baker v. Charlton*, *Peake*, 80. *Lloyd v. Ashby*, 2 *B. and Adol.* 23. After the bankruptcy of one of two partners, the solvent partner may bind the firm by accepting a bill for a debt *previously* due to the firm, the bill being in the hands of a *boná fide* indorsee. *Ex parte Robinson*, 1 *Mont. and Ayr.* 18. *See Woodbridge v. Swan*, 4 *B. and Adol.* 633. But a solvent partner, cannot, after an act of bankruptcy committed by his co-partner, bind the firm by accepting bills for a third person in order to cover acceptances of that person for the accommodation of the firm. *Ex parte Ellis*, *Mont. and B.* 249, 2 *Deac. and Ch.* 555, *S. C.* In an action against A. and B. as acceptors, if A. pleads a plea which admits his signature, yet it must still be proved as against B. *Gray v. Palmers*, 1 *Esp.* 135. If the acceptance is by agent, his authority and handwriting must be proved, and the agent himself is a competent witness to prove the authority. If the authority was in writing it should be produced and proved. *Johnson v. Mason*, 1 *Esp.* 90. If the defendant acknowledges his handwriting, or promises to pay; *Jones v. Morgan*, 2 *Campb.* 474; or pays part; *Vaughan v. Fuller*, 2 *Str.* 1246; it is an admission, and dispenses with the proof of the acceptance. An admission by one of several acceptors, not partners, is not evidence against the rest; *Gray v. Palmers*, 1 *Esp.* 135; but after a partnership is established, the admission of the partner who accepted the bill will be proof of the acceptance against all; *Hodenpyl v. Vingerhoed*, *Chitty on bills*, 489, 5*th ed.*, *see ante p.* 42, and an admission by one partner of his partnership with his co-defendants, who had been outlawed, was held to be sufficient proof of the partnership as against him. *Sangster v. Mazarredo*, 1 *Stark.* 161. If the acceptor, on being applied to for payment, desire the party to call again, it will not prevent him from proving the acceptance a forgery, but it is otherwise if he has adopted the acceptance, as by paying other bills of the same kind; *Barber*

v. Gingell, 3 *Esp.* 60; or acknowledging the handwriting to be his. *Leach v. Buchanan*, 4 *Esp.* 226.

Where in an action against the acceptor of a bill, his attorney gave a notice to produce all papers relating to a bill described as the bill in question, "accepted by the said defendant," the notice was held to be *primâ facie* evidence of the acceptance. *Holt v. Squire, R. and M.* 282.

Some evidence of the identity of the defendant and the person who has accepted the bill is necessary, and it is not sufficient merely to prove that a person, calling himself by the same name, accepted the bill. *Bull. N. P.* 171. *Middleton v. Sandford*, 4 *Campb.* 34. *Parkins v. Hawkshaw*, 2 *Stark.* 239; *see Bulkeley v. Butler*, 2 *B. and C.* 441, *post.* *Roach v. Ostler*, 1 *Mann. and Ry.* 120. *Corfield v. Parsons*, 1 *Crom. and M.* 730.

Acceptance, effect of.] An acceptance admits the handwriting of the drawer, and if the bill be drawn by procuration, the procuration; *Robinson v. Yarrow*, 7 *Taunt.* 455, *Porthouse v. Parker*, 1 *Campb.* 82; and the acceptor cannot say that the drawer's name is forged. *Smith v. Chester*, 1 *T. R.* 655, *Bass v. Clive*, 4 *Mau. and S.* 15. So if the bill was drawn in the name of a firm, the acceptor cannot object that it was drawn by a single person; *Bass v. Clive*, 4 *Mau. and S.* 13; nor can he set up the drawer's inability, as that he was an infant. *Taylor v. Croker*, 4 *Esp.* 187.

Evidence under common counts.] If the payee is also the drawer, the bill will be evidence under the count for money had and received; *Thompson v. Morgan*, 3 *Campb.* 101; or under the count on an account stated; *Per Abbott, C. J.*, *Rhodes v. Gent*, 5 *B. and A.* 245; and it is said to be *primâ facie* evidence of money had and received by the acceptor to the use of the *holder*; *Bayley on bills*, 287, *4th ed.*; but this does not appear to be law unless between immediate parties. *Bentley v. Northouse, M. and M.* 66, *Waynam v. Bend*, 1 *Campb.* 175. An acknowledgment of the debt by the defendant will enable the holder to recover upon the count on an account stated. *Highmore v. Primrose*, 5 *Mau. and S.* 65.

Indorsee against Acceptor.

In an action by the indorsee against the acceptor, the plaintiff must prove the acceptance if that fact be traversed (which admits the drawing of the bill, *vide supra*), and secondly, the indorsements stated in the declaration, if those indorsements are denied on the pleadings.

Indorsement, how proved.] None of the indorsements are admitted by the acceptance; *Smith v. Chester*, 1 *T. R.* 654;

and even where the bill is payable to the drawer's order, his hand-writing as *indorser* must be proved, though his name was on the bill at the time of acceptance. *Bosanquet v. Anderson*, 6 *Esp.* 43. So where a bill, drawn payable to the drawer's own order, was drawn and indorsed by procuration, by the same person, it was held that the acceptance only admitted the drawing by procuration, and not the indorsement by procuration. *Robinson v. Yarrow*, 7 *Taunt.* 455. But in an action against the acceptor of a bill, drawn in favour of A. and B., and indorsed by A. in the name of A. and B., and afterwards accepted by the defendant, on its being objected that the payees were not partners, and that, therefore, the indorsement was irregular, Lord Ellenborough is said to have held, that after acceptance, the defendant could not dispute the regularity of the indorsement; *Jones v. Radford*, 1 *Campb.* 83 (*n*), *sed quære*, for it is said by Lord Ellenborough, in another case, that though the drawee accept the bill with many names on it, if laid in the declaration, they should be proved. *Bosanquet v. Anderson*, 6 *Esp.* 43. But where a bill is drawn in the name of a fictitious person, payable to the order of the drawer, the acceptor is considered as undertaking to pay to the order of the person who signed as the drawer; and therefore an indorsee may bring evidence to show that the signatures of the supposed drawer to the bill and to the first indorsement, are in the same handwriting. *Cooper v. Meyer*, 10 *B. and C.* 468. Where there was no proof of the handwriting of one of the indorsers, but it appeared that the indorsement was upon the bill when the defendant accepted it, *and that he promised to pay it*, Ryder, C. J., left the case to the jury, who found for the plaintiff, and the court refused a new trial. *Hankey v. Wilson, Say.* 223. *Bayley on bills*, 367. Where a bill was shown to the drawer with the name of the payee indorsed upon it, and the drawer merely objected the want of consideration, it was ruled that it did not supersede the necessity of proving the indorser's handwriting. *Duncan v. Scott*, 1 *Campb.* 101. An offer made by the acceptor to pay a bill, with certain names on it, is a sufficient admission of the plaintiff's title, so as to supersede the necessity of proof of each person's handwriting. *Bosanquet v. Anderson*, 6 *Esp.* 45; *see also Sidford v. Chambers*, 1 *Stark.* 326. An admission of his handwriting by the indorser, though evidence against himself, is not evidence in an action against the acceptor. *Hemings v. Robinson, Barnes*, 436. *Bayley on bills*, 379, 4*th ed.*; *but see Maddocks v. Hankey*, 2 *Esp.* 647. An authority to draw does not of itself import an authority to indorse bills, but is evidence to go to the jury. The clerk of the payees of a bill having been accustomed to draw checks and bills for them, and having been in one instance authorised to indorse a bill, and in two others having indorsed bills which had been discounted by the payees at

their bankers, it was held that the jury were warranted in finding that the clerk had a general authority to indorse. *Prescott v. Flinn*, 9 *Bingh.* 19.

It must appear that the indorsements were made by the persons by whom they purport to have been made. *See ante, p.* 85, *as to identity.* In an action by an indorsee against the acceptor of a bill of exchange, whereof E. S. was the payee, the plaintiff proved, that a person calling himself E. S. came to C., having in his possession the bill in question, and also a letter of introduction proved to be genuine, which was expressed to be given to a person introduced to the writer as E. S., and also another bill of exchange, drawn by the writer of that letter. The bearer of these documents, after remaining ten days at C., during which time he daily visited the plaintiff, indorsed to him the bill in question and received value for it, and also a letter of credit. This was held to be evidence of the identity of this person with E. S., in the absence of any evidence in answer. *Bulkeley v. Butler*, 2 *B. and C.* 434.

What indorsements are good.] An indorsement is equivalent to a new drawing, and if after a special indorsement and before the special indorsee indorses it, the defendant puts his name upon the bill, and then the special indorsee indorses it, the latter may sue the defendant and no new stamp is necessary. *Penny v. Innes*, 1 *Crom. M. and R.* 439. If the payee has delivered over the bill without indorsement, for a valuable consideration, and afterwards becomes bankrupt, he may indorse it notwithstanding his bankruptcy. *Smith v. Pickering, Peake*, 50. So the drawer of a bill payable to his own order, and accepted for his accommodation, may indorse it after his bankruptcy, for it does not pass to his assignees. *Wallace v. Hardacre*, 1 *Campb.* 46. *Arden v. Watkins*, 3 *East*, 317. An indorsement by a feme covert, of a bill payable to her order, in her own name, conveys no interest; *Barlow v. Bishop*, 1 *East*, 432; unless from circumstances the jury can infer an authority from her husband to her to indorse it in such name, as if he promise to pay the bill. *Id.* 434. *Cotes v. Davis*, 1 *Campb.* 485. *Prince v. Brunatte*, 1 *Bingh. N. C.* 435, 5 *Moore and S.* 342, *S. C.* And where a feme covert draws and indorses a bill with the consent of her husband, the indorsee may sue the acceptor. *Prestwick v. Marshall*, 7 *Bingh.* 565. An indorsement by the husband of a bill payable to the wife is good. *Mason v. Morgan*, 4 *Nev. and M.* 46. Infancy being a personal privilege, *the acceptor* cannot set up the infancy of the *indorser* as a defence. *Taylor v. Croker*, 4 *Esp.* 187, *recog.* 2 *B. and C.* 299; *and see Jones v. Darch*, 4 *Price*, 300. On the death of the holder, his executor or administrator may indorse. *Rawlinson v. Stone*, 3 *Wils.* 1. Unless the persons indorsing are in partnership, the indorse-

ment of each must be proved; *Carvick v. Vickery*, 2 *Dougl.* 653 (*n*); but if a partnership be proved, an indorsement by one of the partners, in the partnership name, is sufficient, *vide supra.* On the dissolution of a partnership, a power given to one of the partners to receive and pay debts, does not authorise him to indorse a bill in the name of the partnership. *Kilgour v. Finlyson*, 1 *H. Bl.* 155. *See Dolman v. Orchard*, 2 *C. and P.* 104. *Lacy v. Woolcot*, 2 *D. and R.* 458. And if one of several partners, who have a right to indorse, becomes bankrupt and indorses the bill, such an indorsement, though made to a creditor of the firm, will confer no title; *Thomason v. Frere*, 10 *East*, 418; *see Drayton v. Dale*, 2 *B. and C.* 293; *Burt v. Moult*, 1 *C. and M.* 525; but where the partners hold the bill as trustees, and one of them becomes bankrupt, he and the rest may indorse. *Ramsbotham v. Cator*, 1 *Stark.* 228. On a bill payable to A., for the use of B., the right to transfer is in A. *Evans v. Cramlington*, *Carth.* 5; *but see Sigourney v. Lloyd*, 8 *B. and C.* 631.

What indorsements need be proved.] If all the indorsements have been stated, though unnecessarily, they must (if denied), it seems, be proved; *Waynam v. Bend*, 1 *Campb.* 175; *Bosanquet v. Anderson*, 6 *Esp.* 43; but where the first indorsement is in blank, the plaintiff may state an indorsement from the payee to himself immediately, though there be intermediate special indorsements, and it will only be necessary to prove the first indorsement. *Smith v. Clarke*, *Peake*, 225. In an action by the indorsees of a bill against the acceptor, the first count stated all the indorsements, the second count an indorsement by the payee to the plaintiff; Abbott, C. J., said, that all the indorsements must be proved or struck out, though not stated in the declaration. "I remember," said his Lordship, "Mr. Justice Bayley so ruling, and striking them out himself at the trial; and this need not be done before the trial." *Cocks v. Borrodaile*, *Chitty*, 392, *7th ed.* The indorsement may be struck out after the bill has been read in evidence. *Mayer v. Jadis*, 1 *Moo. and Rob.* 247.

Title of the plaintiffs as indorsees.] When a bill is indorsed in blank, possession is sufficient *primâ facie* title, and several plaintiffs suing as indorsees need not prove that they are in partnership, or that the bill was indorsed to them jointly; *Ord v. Portal*, 3 *Campb.* 239; *Rordasnz v. Leach*, 1 *Stark.* 446; *and see Machell v. Kinnear*, 1 *Stark.* 499; *Attwood v. Rattenbury*, 6 *B. Moore*, 579; but where it is specially indorsed to a firm, the partnership of the plaintiffs must be proved; 3 *Campb.* 240; and where the plaintiffs sue in a particular capacity, as assignees of a bankrupt for instance, they must prove that the bills were indorsed to them in that capa-

city. *Bernasconi v. Duke of Argyle*, 3 *C. and P.* 29. A person to whom a bill is indorsed, for the purpose of procuring payment, may sue upon it though indebted to the indorser, and though without authority from him to bring an action; *Adams v. Oakes*, 6 *C. and P.* 70; or the indorser may sue. *Stones v. Butt*, 2 *Crom. and M.* 416. So an indorsee, who has taken by way of gift, may sue the acceptor for value. *Heydon v. Thompson*, 3 *Nev. and M.* 319.

Evidence under the money counts.] An acceptance is said to be evidence of money had and received by the acceptor to the use of the holder; *Bayley on bills*, 287; and it has therefore been supposed, that in an action by an indorsee against an acceptor, the bill may be given in evidence under the count for money had and received. 2 *Phil. Ev.* 30. But late authorities show that it is only where the bill or note is enforced between immediate parties, that the plaintiff can recover on the count for money had and received. *Waynam v. Bend*, 1 *Campb.* 175. *Exon v. Russell*, 4 *Mau. and S.* 507. *Thompson v. Morgan*, 3 *Campb.* 101. *Wells v. Girling*, *Gow*, 22, 3 *B. Moore*, 79. *Bentley v. Northouse*, *M. and M.* 66. *Eales v. Dicker*, *M. and M.* 324.

Drawer against Acceptor.

When a bill, not payable to the drawer's order, has been dishonoured and taken up by the drawer, the latter may sue the acceptor, and in such action must prove, 1, The acceptance if traversed, (*vide ante p.* 194); 2, The presentment to the defendant, and his refusal, which may be done by calling the person who presented the bill, or by proving a promise to pay by the defendant, which dispenses with proof of the presentment; and 3, The payment of the bill by the plaintiff. To prove the latter fact, it is not sufficient to produce the bill with a receipt on the back of it, as from the then holder, for the receipt *primâ facie* imports that the bill was paid by the acceptor. *Scholey v. Walsby*, *Peake*, 24. It will not be necessary for the plaintiff, in the first instance, to prove that the defendant had effects of the plaintiff in his hands, the acceptance being sufficient *primâ facie* evidence of that fact. *Vere v. Lewis*, 3 *T. R.* 183. The bill may be given in evidence under the count for money had and received, where it is payable to the order of the drawer. *Thompson v. Morgan*, 3 *Campb.* 101, *vide supra.*

Payee against Drawer.

In an action by the payee against the drawer, the plaintiff must prove, if traversed, 1, The drawing of the bill; 2, Presentment to the drawee or acceptor; 3, His default; 4, Notice to the defendant of the dishonour.

The drawing of the bill.] The drawing of the bill where traversed must be proved by evidence of the drawer's handwriting, *see ante p.* 87; or if drawn by an agent, by proving the authority of the agent and his handwriting. If drawn in the name of a partnership, the partnership must be proved, and the handwriting of the partner who drew the bill, *see ante p.* 196.

Presentment to the drawee or acceptor.] A presentment for *acceptance* is not *necessary*, except in cases of bills payable within a limited time after sight; *Bayley on bills*, 182; but if presented and refused acceptance, notice of such refusal must be given; *Goodall v. Dolley*, 1 *T. R.* 712; though the drawer of a bill is not discharged by want of notice of non-acceptance where the bill has passed into the hands of a *bonâ fide* indorsee for value, who has no knowledge of the dishonour. *Dunn v. O'Keeffe*, 5 *Mau. and S.* 282. Where the bill is payable at a certain date, and not presented for acceptance, a presentment for payment on the last day of grace must be proved; *Tassell v. Lewis*, 1 *Ld. Raym.* 743; *Bayley on bills*, 198; but where it is payable at a certain time after sight, or at sight, it need only be presented within a reasonable time; which has been held to be, though the authorities differ on the point, a question for the jury; *Muilman v. D'Eguino*, 2 *H. Bl.* 565; *Fry v. Hill*, 7 *Taunt.* 397; *see the cases, Bayley on bills*, 187; or rather a mixed question of law and fact. *Shute v. Robins, M. and M.* 133, 9 *Bingh.* 423. If a bill drawn at three days' sight were put into circulation, and kept out in that way for a year, it would not, as it seems, be *laches*; but if the holder were to lock it up for any length of time, it seems he would be guilty of *laches*. *Per Buller, J., Muilman v. D'Eguino*, 2 *H. Bl.* 565. The question in these cases is whether, looking at the situation and interests of both holder and drawer, there has been any unreasonable delay on the part of the former in forwarding the bill for acceptance or putting it into circulation. *Mellish v. Rawdon*, 9 *Bingh.* 416. Where a bill drawn by the defendant at one month after sight, on London, was delivered to the plaintiff on the 9th, at Windsor, and was presented on the 13th, and the jury found a verdict for the plaintiff, the court of C. P. refused to disturb the verdict. *Fry v. Hill*, 7 *Taunt.* 397.

A distinction has been taken with regard to bills payable after sight, drawn by bankers in the country on their correspondents in London. "It does not seem unreasonable," says Lord Tenterden, "to treat bills of this nature as not requiring immediate presentment, but as being retainable by the holders for the purpose of using them, within a moderate time (for indefinite delay of course cannot be allowed), as part of the circulating medium of the country." *Shute v. Robins, M. and M.* 133.

Bills due on a Sunday or Christmas-day; *Tassell v. Lewis*, 1 *Ld. Raym* 743; or on a Good-Friday; 39 and 40 Geo. 3, c. 42; or on a fast day; 7 and 8 Geo. 4, c. 15; are to be presented on the day next before those respective days.

Presentment must be proved, although the acceptor has become bankrupt; *Russel v. Langstaffe, Dougl.* 514; or insolvent; *Esdaile v. Sowerby*, 11 *East*, 117, *Rohde v. Proctor*, 4 *B. and C.* 523; and where he is dead it must be made to his executor or administrator, or if there be none, at the house of the deceased. *Molloy, b.* 2, *c.* 10, *s.* 34. *Chitty on bills*, 317, 5*th ed.* If the bill is payable at a particular place, it is not necessary to present it to the executor. *Philpot v. Bryant*, 3 *C. and P.* 244. Where a bill is accepted by an agent, the drawee being abroad, presentment to the agent must be proved. *Philips v. Astling*, 2 *Taunt.* 206.

A bill payable at a banker's must be presented within banking hours; *Elford v. Teed*, 1 *Maule and S.* 28; but if presented after, and a servant stationed at the banking-house return for answer, "*No orders*," it is sufficient. *See Whitaker v. Bank of England*, 1 *Crom. M. and R.* 744, 6 *C. and P.* 700, *S. C. Garnett v. Woodcock*, 6 *Maule and S.* 44. *Henry v. Lee*, 2 *Chitty*, 125. Presentment at eight in the evening, at the house of a merchant, is good. *Barclay v. Bailey*, 2 *Campb.* 527. So at half past seven, though no one be there. *Wilkins v. Jadis*, 2 *B. and Adol.* 188, 1 *Moo. and Rob.* 41, *S. C.* Presentment to a banker's clerk at the clearing-house, is a presentment at the banker's. *Reynolds v. Chettle*, 2 *Campb.* 595. *Harris v. Packer*, 3 *Tyr.* 370 (*n*).

If a bill or note is made payable at a particular house, that house is the proper place at which to make the presentment, whether such house be mentioned in the body of the bill or note, or in a marginal note only, or in the acceptance only. *Bayley on bills*, 174, *citing Ambrose v. Hopwood*, 2 *Taunt.* 61, *Garnett v. Woodcock*, 1 *Stark.* 475. Although since the statute 1 and 2 Geo. 4, c. 78, the holder of a bill accepted payable at a banker's (not saying, and not otherwise, &c.) is not obliged, in order to charge the acceptor, to present it for payment there, *Turner v. Hayden*, 4 *B. and C.* 2, *Bayley on bills*, 178, yet a presentment there, and refusal, with notice, will, it seems, be sufficient to charge the drawer. *See Mackintosh v. Haydon, R. and M.* 363. Where the bill is drawn payable (in the body of it) in London, and is accepted payable at A. B. in London (without saying "not otherwise, &c.") in an action against the *drawer*, presentment in London must be proved, this not being a case within the statute 1 and 2 Geo. 4, c. 78. *Gibb v. Mather*, 8 *Bingh.* 214, 2 *C. and J.* 254, *S. C.* Under the general averment that the bill was duly presented, (without stating an acceptance,) the plaintiff may prove a presentment at the place mentioned in the acceptance. *Parks v. Edge*, 1 *Crom. and M.* 429. If the presentment be at the place

mentioned in the acceptance, the handwriting of the acceptor must be proved, otherwise it would not appear that the place indicated in the acceptance was appointed by him. *Sedgwick v. Jager*, 5 *C. and P.* 199.

When a bill was drawn on "P. P., No. 6, Budge Row," and accepted, in an action against the drawer an averment that the bill was presented and shewn to P. P. for payment, is supported by proof that the holder went to No. 6, Budge Row, but found the house shut up and no one there; and notice of dishonour may be given on the same day. *Hine v. Allely*, 4 *B. and Ad.* 624.

Presentment, proof of, when dispensed with.] Payment of part of the money due upon a bill or note, or a subsequent promise to pay, with knowledge that the bill has not been duly presented, will be evidence of presentment under the usual averment. *Taylor v. Jones*, 2 *Camph.* 106. *Lundie v. Robertson*, 7 *East*, 231. So unavoidable accident will excuse a regular presentment. "*Duly presented*, is presented according to the custom of merchants, which necessarily implies an exception in favour of those unavoidable accidents which must prevent the party from doing it within the regular time." *Per Ld. Ellenborough, Patience v. Townley*, 2 *Smith*, 224. The mere knowledge on the part of the drawer or indorser of a bill, that the bill when presented is likely to be dishonoured, will not dispense with the presentment. *Prideaux v. Collier*, 2 *Stark.* 57. *Pickin v. Graham*, 1 *Crom. and M.* 725, *post.*

Default of drawee or acceptor.] If the action is brought on a refusal to accept, it is sufficient for the plaintiff to show that the drawee refused to accept it generally, or according to the terms of the bill. *Boehm v. Garcias*, 1 *Camph.* 425 (*n*). It is not sufficient to show that the bill was presented to some person on the drawee's premises who refused to accept it, without connecting that person with the drawee. *Cheek v. Roper*, 5 *Esp.* 175. The refusal to accept, or pay, may be proved by the person who presented the bill for acceptance or payment.

Notice of dishonour.] There is no prescribed form of notice, but a mere demand of payment, without notice of the dishonour, is not sufficient. *Hartley v. Case*, 4 *B. and C.* 339; *see Margesson v. Goble*, 2 *Chitty's R.* 364. The following notice from the attorney of the holder has been held insufficient. "A bill for 683*l.* drawn, &c., and bearing your indorsement, has been put into our hands by Mr. A., with directions to take legal measures for the recovery thereof unless immediately paid." *Solarte v. Palmer*, 7 *Bingh.* 530, *S. C. in Error*, 1 *Bingh. N. C.* 194, 5 *Moore and S.* 1, 2 *Clark and F.* 93.

The notice must not be calculated to mislead, as in stating that the bill is *drawn* instead of *indorsed* by the party. *Beauchamp v. Cash, Dow. and Ry. N. P. C.* 3. A *written* notice is not required. *Crosse v. Smith*, 1 *Mau. and S.* 545. Notice to the drawers, by sending to their counting-house, during the hours of business on two successive days, knocking there, and making noise sufficient to be heard by persons within, and waiting there several minutes, the inner door of the counting-house being locked, is sufficient, without leaving a notice in writing, or sending by the post, though some of the drawers live at a small distance from the place. *Ibid.* Although mere *knowledge* of the dishonour is not sufficient without *notice*, yet proof that the drawer of a bill knew, two days after maturity, that it was unpaid, and in the hands of a particular indorsee, and objected to pay it, on the ground of fraud in the obtaining of it, Lord Tenterden held that it was evidence to go to the jury that he had received notice of dishonour. *Wilkins v. Jadis*, 1 *Moo. and Rob.* 41. *Vide post p.* 207.

By whom given.] It is sufficient if the defendant has had notice of the dishonour of the bill, from any person who is party to pay it; *Jameson v. Swinton*, 2 *Campb.* 373, *Wilson v. Swabey*, 1 *Stark.* 34, *Rosher v. Kieran*, 4 *Campb.* 87, *Gunson v. Metz*, 1 *B. and C.* 193, *Chapman v. Keane*, 4 *Nev. and M.* 607; though it was formerly thought that the notice must come from the holder; *Tindal v. Brown*, 1 *T. R.* 167; but notice given by a person not a party to the bill, without any authority, is not sufficient. *Stewart v. Kennett*, 2 *Campb.* 177.

To whom notice should be given.] Where the holder of a bill is desirous of suing all the parties to it, he should give notice to all, for if he only gives notice to his immediate indorser, &c., it is possible that such notice may not be regularly transmitted to the prior parties, who may consequently be discharged. But if he give notice to his immediate indorser, and he, in due time, to his indorser, and so on to the drawer, the holder may sue all or any of such parties, and it is no objection in such case that there was no notice immediately from the plaintiff to the defendant. *Bayley on bills*, 209. *Rosc. Dig. Bills*, 198. The bankruptcy of the drawer does not dispense with proof of notice. Where notice was given to a bankrupt drawer, before the appointment of assignees, it was held sufficient. *Ex parte Moline*, 19 *Ves.* 216. Where the drawer had become bankrupt and absconded, but his house remained open in the possession of the messenger, and no notice was given to the drawer, or left at his house, or given to the assignees, the drawer's estate was held to be discharged. *Rohde v. Proctor*, 4 *B. and C.* 517. Where the bankrupt had left his house, it was held that notice should be left there, and with the messenger in possession.

Ex parte Johnson, 1 *Mont. and Ayr.* 622, 3 *Deacon and Ch.* 433, *S. C.* Where the drawer is dead, notice should be given to his executors or administrators. *Chitty on bills*, 295, *5th ed.* Where the drawers are in partnership, a notice to one is a notice to all; and, therefore, where a bill is drawn by a firm upon one of that firm, and dishonoured, notice of the dishonour need not be given to the firm. *Porthouse v. Parker*, 1 *Campb.* 82. Where the indorser of a dishonoured bill was abroad in Jamaica, but had a house in England, and notice was sent to his house, and the bill was shown to his wife, who was informed of the non-payment, Lord Kenyon held it sufficient. *Cromwell v. Hynson*, 2 *Esp.* 511. Where a substituted bill has been given and dishonoured, and the plaintiff sues on the first bill, he need only prove the dishonour, and not notice of the dishonour of the substituted bill. *Bishop v. Rowe*, 3 *Mau. and S.* 362. Notice to the drawer's attorney is not sufficient. *Cross v. Smith*, 1 *Mau. and S.* 554.

Time within which notice must be given.] The general rule with regard to inland bills is, that where the parties do not reside in the same town, it is sufficient to send a notice by the post of the day following that on which the party receives intelligence of the dishonour. *Williams v. Smith*, 2 *B. and A.* 497. Where there is a post on the day on which the party who is to forward it receives the notice, and no post on the following day, it is sufficient to forward the notice by the post of the third day. *Geill v. Jeremy*, *M. and M.* 61. If the parties reside in the same town, notice must be given before the expiration of the day after that on which it has been received. *Smith v. Mullett*, 2 *Campb.* 208. Where the party receives notice on a Sunday, Good-Friday, or Christmas-day, he is in the same situation as if it did not reach him till the next day. *Bray v. Hadwen*, 5 *Mau. and S.* 68. *Bayley on bills*, 220, 221, 4*th ed.* And where a bill is payable, either by 39 and 40 Geo. 3, c. 42 (*ante p.* 203), or otherwise, on the day preceding Christmas-day, Good-Friday, Thanksgiving-day, or Fast-day, it is not necessary for the holder to give notice until the day next after such Christmas-day, &c., 7 and 8 Geo. 4, c. 15. A Jew is not obliged to forward notice on the day of a grand Jewish religious festival. *Lindo v. Unsworth*, 2 *Campb.* 602. If the holder place the bill in the hands of his banker, the latter is only bound to give notice to his customer in like manner as if he were himself the holder, and the customer has the same time to communicate the notice as if he had received it from the holder. *Haynes v. Birks*, 3 *B. and P.* 599. *Bayley on bills*, 222. *Langdale v. Trimmer*, 15 *East*, 291. Where *laches* is once incurred, the drawer is discharged, though he receive notice at the time within which, had each person regularly transmitted notice to another, he would have received it. *Turner v. Leech*, 4 *B. and A.* 451. *Marsh v.*

Maxwell, 2 *Campb.* 210 (*n*). A letter written six days after the drawer should, in due course, have received notice of dishonour, containing ambiguous expressions respecting the non-payment of the bill, is evidence to go to the jury of regular notice. *Booth v. Jacobs*, 3 *Nev. and M.* 351. But where the defendant said in allusion to his defence, that "the plaintiff had not sent the letter to him in time," this was held (by Lord Denman) not to be evidence to go to the jury of notice of dishonour. *Braithwaite v. Coleman*, 4 *Nev. and M.* 654. *Vide ante* 205.

A notice on the day on which the bill becomes due is not too soon; for though payment may still be made within the day, non-payment on presentment is a dishonour; *Burrige v. Manners*, 3 *Campb.* 193; unless the acceptor afterwards, and on the same day, pays the bill. *Hartley v. Case*, 1 *Carr. and P.* 556.

Delivery of notice, proof of.] It is sufficient proof of the delivery of the notice, to show that it was sent in a letter by the post, without proving that the letter was received; *Saunderson v. Judge*, 2 *H. Bl.* 509; and in London by the two-penny post; *Scott v. Lifford*, 9 *East*, 347; provided the delivery be on the day on which notice should be given. *Smith v. Mullett*, 2 *Campb.* 208. If a note is sent by post, the direction of the letter must not be too general, as "Mr. Haynes, Bristol;" *Walter v. Haynes*, *R. and M.* 149; but where the bill was dated "Manchester," Abbott, C. J., held that it was sufficient to direct a letter to the drawer at "Manchester," generally. *Mann v. Moors*, *R. and M.* 249. It is not essential that notice should be sent by the post, a private conveyance is sufficient. *Bancroft v. Hall*, *Holt*, 476. If there is no post, the notice may be sent by the ordinary mode of conveyance, as in case of a foreign bill, by the first regular ship bound for the place where notice is to be given. *Muilman v. D'Eguino*, 2 *H. Bl.* 565. In proving a notice sent by post, it was ruled by Lord Ellenborough not to be sufficient to show that it was contained in a letter, which letter was put upon a table for the purpose of being carried to the post, and that, in the course of business, all letters deposited on that table were carried to the post; but perhaps it might have been sufficient had the person who was in the habit of carrying the letters to the post been called, and stated that he invariably carried all such letters to the post. *Hetherington v. Kemp*, 4 *Campb.* 193. Where, to prove the sending of a notice by post, the plaintiff's clerk was called, who stated that a letter containing the notice was sent by post on a Thursday morning, but he had no recollection whether it was put in by himself or another clerk, it was held that this was not sufficient evidence of the putting into the post. *Hawkes v. Salter*, 4 *Bingh.* 715. Proof that the notice was left with a person at the house where the defendant lodged, and that the next morning the notice was

thrown into the plaintiff's house by a person unknown, is sufficient. *Stedman v. Gooch*, 1 *Esp.* 5.

Contents of notice, how proved.] Where a written notice has been given, but no duplicate or copy kept, it is not requisite to give a notice to produce the notice of dishonour. Le Blanc, J., admitted parol evidence of the contents, without a notice to produce, and the court refused a new trial. *Ackland v. Pearce*, 2 *Campb.* 601. *Kine v. Beaumont*, 3 *B. and B.* 288, 7 *B. Moore*, 119, *S. C. Colling v. Treweek*, 6 *B. and C.* 394; *but see Langdon v. Hulls*, 5 *Esp.* 156, *Shaw v. Markham*, *Peake*, 165. And where a duplicate original or copy of the notice has been kept, it is good evidence, without a notice to produce; *Kine v. Beaumont*, 3 *B. and B.* 288; and proof that duplicate notices of dishonour were written, and that a letter (the witness could not state the contents) was sent on the same day by the plaintiff to the defendant, is sufficient, a notice to produce the letter having been served. *Roberts v. Bradshaw*, 1 *Stark.* 28; *see* 3 *B. and B.* 290. But where, in an action against the indorser of a bill, it became necessary to prove that notice of the dishonour of *other bills* had been given to the defendant, for which purpose examined copies of letters containing such notices were offered, Abbott, C. J., ruled that a notice to produce such letters was necessary, and that the case did not fall within the exception of bills produced, and the subject matter of the action, where no notice is necessary. *Lanauze v. Palmer*, *M. and M.* 31.

Protest.] In case of a foreign bill, notice without a protest is not sufficient, unless the party to whom notice is given resides in this country; *Robins v. Gibson*, 1 *Mau. and S.* 288; though he should happen at the time of the dishonour to be absent. *Cromwell v. Hynson*, 2 *Esp.* 511. In case of an inland bill, a protest is of no effect. *Windle v. Andrews*, 2 *B. and A.* 696. The production of the instrument, when made abroad, is sufficient proof of the protest. *Anon.* 12 *Mod.* 345. A protest made in England must, it is said, be proved by the notary who made it, and by the subscribing witness, if any. *Chitty on bills*, 405, 7*th ed.* The presentment of a foreign bill in this country must be proved as if it were an inland bill, and the protest is not evidence of it. *Chesmer v. Noyes*, 4 *Campb.* 129.

By the 2 & 3 W. 4, c. 98, reciting that doubts having arisen as to the place in which it is requisite to protest for non-payment bills of exchange which, on the presentment for acceptance to the drawee or drawees, shall not have been accepted, such bills of exchange being made payable at a place other than the place mentioned therein to be the residence of the drawee or drawees thereof, and that it is expedient to remove such doubts, it is enacted that from and after the passing

of that act, all bills of exchange wherein the drawer or drawers thereof shall have expressed that such bills of exchange are to be payable in any place other than the place by him or them therein mentioned, to be the residence of the drawee or drawees thereof, and which shall not on the presentment for acceptance thereof be accepted, shall and may be, without further presentment to the drawee or drawees, protested for non-payment in the place in which such bills of exchange shall have been by the drawer or drawers expressed to be payable, unless the amount owing upon such bill of exchange shall have been paid to the holder or holders thereof, on the day on which such bills of exchange would have become payable had the same been duly accepted.

Notice, proof of, when excused.] The plaintiff will not be obliged to give evidence of notice to the drawer, where the latter has no effects in the hands of the drawee or acceptor, or where the drawer has, with a knowledge of the dishonour, acknowledged his liability, or where the plaintiff has been unable to discover the residence of the drawer, so as to give him notice. *See post.*

Notice excused, no effects.] Proof that the drawer had no effects, nor any ground to expect any in the hands of the drawee, from the time the bill was drawn, until it became payable, and that he had no other valid foundation to expect payment by the drawee, is sufficient, at least *primâ facie*, to show that the drawer would be entitled to bring no action on paying the bill, and has, therefore, no right to insist on the want of notice; *Bayley on bills*, 238, *citing Rogers v. Stevens*, 2 *T. R.* 713, *Bickerdike v. Bollman*, 1 *T. R.* 405, *Legge v. Thorpe*, 12 *East*, 171; or in case of a foreign bill, of protest. *Legge v. Thorpe*, 2 *Campb.* 310, 12 *East*, 171. If the drawer had effects on the way to the drawee, notice must be proved. *Rucker v. Hiller*, 3 *Campb.* 217, 16 *East*, 43, 12 *East*, 175. So if the drawer had effects in the drawee's hands, at the time when the bill was drawn, he is entitled to notice, though at the time the bill was presented for acceptance, and thence until presentment for payment, he had not any. *Orr v. Maginnis*, 7 *East*, 359. So, though there were no effects at the time the bill was drawn or accepted, if there were when it became due; the whole period must be looked to, from the drawing of the bill till it is due, and notice is requisite if the drawee has effects at any time during that interval. *Hammond v. Dufrene*, 3 *Campb.* 145. *Thackray v. Blackett*, 3 *Campb.* 164. So if the drawer has effects in the hands of the drawee, though he is indebted to the drawee greatly beyond that amount. *Blackhan v. Doren*, 2 *Campb.* 503. So where the drawer has effects in the hands of the drawee, though to less amount than the bill. *Thackray v. Blackett*, 3 *Campb.* 164; *but see Smith v. Thatcher*,

4 *B. and A.* 200. So where there is a running account between the drawer and the drawee, and a fluctuating balance between them, and the drawer has reasonable grounds to expect that he shall have effects in the drawee's hands when the bill becomes due; *per Lord Ellenborough, Brown v. Maffey*, 15 *East*, 221; or where the bill is drawn in the fair and reasonable expectation that, in the ordinary course of mercantile transactions, it would be accepted or paid; *per Le Blanc, J., Claridge v. Dalton*, 4 *Mau. and S.* 231; *and see France v. Lucy, R. and M.* 342; or where the acceptor has received from the drawer his acceptances, upon which he has raised money, and some of which are outstanding; *Spooner v. Gardiner, R. and M.* 84; notice must be proved; and in general where the drawer would have any remedy over against a third person, as in the case of a bill drawn for the accommodation of an indorsee, notice must be given to the drawer; *Cory v. Scott*, 3 *B. and A.* 623; *Norton v. Pickering*, 8 *B. and C.* 610; or where the drawer has reasonable grounds to expect that the acceptor, or some one else, will pay the bill, though there are no assets in the acceptor's hands. *Lafitte v. Slatter*, 6 *Bingh.* 623.

Where the drawer of a bill makes it payable at his own house, a jury may infer that it is an accommodation bill. *Sharp v. Bailey*, 9 *B. and C.* 44.

Notice, proof of, excused, on acknowledgment of liability, &c.] An acknowledgment by the drawer, who has become bankrupt, made after his bankruptcy, that the bill would not be paid, will supersede the proof of notice. *Brett v. Levett*, 13 *East*, 213. So a letter from the drawer of an accommodation bill, stating that it would be paid before next term; *Wood v. Brown*, 1 *Stark.* 217; so a promise, after dishonour of the bill, to pay, if the holder would call again; *Lundie v. Robertson*, 7 *East*, 231; so where the drawer of a foreign bill, on being told it was dishonoured, says that his affairs are at that moment deranged, but that he would be glad to pay it as soon as his accounts with his agent are cleared, this admission will dispense with proof of a protest. *Gibbon v. Coggon*, 2 *Campb.* 188; *and see Greenway v. Hindley*, 4 *Campb.* 52, *S. P.* Where the plaintiff gave in evidence an agreement made between a prior indorser and the defendant (the drawer), after the bill became due, reciting that the defendant had drawn, amongst others, the bill in question; that it was over due, and ought to be in the hands of the prior indorser, and that it was agreed that the latter should take the money due to him upon the bill by instalments, this agreement was held to dispense with notice of dishonour. *Gunson v. Metz*, 1 *B. and C.* 193. A payment, or promise, without notice of the default, does not dispense with proof of notice. *Goodall v. Dolley*, 1 *T. R.* 712. The day after a bill had been dishonoured in London, and before the fact of the dishonour could be known in Yorkshire, the drawer's clerk, in Yorkshire,

called on the indorser prior to the holder. A conversation took place as to the bill being likely to come back, and the clerk said "I suppose there will be no alternative, but my taking up the bill, and if you will bring it to Sheffield on Tuesday I will pay the money." The indorsee did not receive the bill or notice, until some days after the Tuesday. It was held that notwithstanding the above conversation, he was entitled to regular notice of dishonour. *Pickin v. Graham*, 1 *Crom. and M.* 725, 3 *Tyr.* 923, *S. C.* *Bayley on bills*, 236. Where the drawer, being a foreigner, on being asked to pay the bill, said, "I am not acquainted with your laws, if I am bound to pay it, I will," this was held not to dispense with notice; *Dennis v. Morrice*, 3 *Esp.* 158; nor will a mere offer to compromise. *Cuming v. French*, 2 *Campb.* 106 (*n*).

The whole of the defendant's admission must be taken together; and therefore, where he said, "I do not mean to insist upon want of notice, but I am only bound to pay you 70*l*.," Abbott, C. J., ruled that the plaintiff could only recover 70*l*., though the bill was for 200*l*. *Fletcher v. Froggatt*, 2 *C. and P.* 570.

Where the drawer, before the bill became due, stated to the holder that he had no regular residence, but would call and inquire whether the bill would be paid, Lord Ellenborough held that proof of notice was unnecessary. *Phipson v. Kneller*, 4 *Campb.* 285; *see also Hill v. Heap, D. and R., N. P. C.* 57.

The accidental destruction of a bill will not excuse the want of notice. *Thackray v. Blackett*, 3 *Campb.* 164.

Notice dispensed with by ignorance of drawer's residence.] The want of due notice is answered by showing the holder's ignorance of the place of residence of the party whom he sues; and whether he used due diligence to find the place of residence, is a question for the jury. *Bateman v. Joseph*, 12 *East*, 433; *and see Baldwin v. Richardson*, 1 *B. and C.* 245. Thus, to excuse notice of the dishonour to an indorser, it is not enough to show that inquiries as to his residence were made at the place at which the bill was payable. *Beveridge v. Burgis*, 3 *Campb.* 262. Calling on the last indorser, and last but one, the day after the bill becomes due, to know where the drawer lives, and on his not being in the way, calling again the next day, and then giving the drawer notice, may be sufficient. *Browning v. Kinnear*, *Gow*, 81. Inquiry should be made of some of the other parties to the bill or note, and of persons of the same name. *Bayley on bills*, 229, *citing Beveridge v. Burgis*, 3 *Campb.* 262. In one case it was held sufficient, on the dishonour of a promissory note, to make inquiry at the drawer's for the residence of the payee. *Sturges v. Derrick*, *Wight.* 76.

An attorney employed to discover the residence of a party to a bill, and discovering it, has, like a banker, a day to consult his employer, and it is sufficient if he forward the information

to him on the next day. *Firth v. Thrush*, 8 *B. and C.* 387. Where the holder is excused by special circumstances from giving notice on the usual day, the common allegation of notice is still sufficient. *Ibid.*

Indorsee against Drawer.

In an action by the indorsee of a bill against the drawer, the plaintiff must prove, 1, The drawing of the bill, if traversed, *ante p.* 202; 2, The indorsement by the payee, and the subsequent indorsements stated in the declaration, if traversed; 3, Presentment to the drawer or acceptor, *ante p.* 202; 4, His default, *ante p.* 204; 5, Notice of dishonour to the defendant, *ante p.* 204.

The proofs therefore will be the same as in an action by the payee against the drawer, with the additional proof of the indorsements. The mode of proving a title by indorsement has already been stated, *ante p.* 197.

Indorsee against Indorser.

In an action by an indorsee against the indorser of a bill, the plaintiff must prove, 1, The signature of the defendant, if denied; 2, The indorsements between that of the defendant and the plaintiff, as stated in the declaration, and traversed in the plea, *ante p.* 198; 3, The presentment to the drawee or acceptor, and the dishonour, *ante p.* 202; 4, The notice of the dishonour to the defendant, *ante p.* 204.

The indorsement of the defendant admits the handwriting of the drawer, and the defendant cannot insist that it is a forgery; *Lambert v. Oakes*, 1 *Ld. Raym.* 443; so it admits the ability and signature of all antecedent indorsers. *Bayley on bills*, 366. *Critchlow v. Parry*, 2 *Camph.* 182. In suing the indorsee, on the non-payment of the bill by the drawee, it is unnecessary to state an acceptance, and if it be stated, it need not be proved. *Tanner v. Bean*, 4 *B. and C.* 312. *Parks v. Edge*, 1 *Crom. and M.* 429.

The rules, with regard to the presentment of the bill and notice of dishonour, are in general the same in this action as in an action by the payee against the drawer, *ante p.* 201. No evidence of a demand upon the drawer or prior indorsers is necessary. *Bomley v. Frazier*, 1 *Str.* 441. The fact that the drawer has never had any effects in the hands of the drawee, will not excuse the want of notice to the indorser, who has no concern with the accounts between the drawer and acceptor; *Wilkes v. Jacks, Peake*, 202, *Brown v. Maffey*, 15 *East*, 216; *see Lesson v.. Thomlinson, Selw. N. P.* 324 (*n*); and the indorser, without consideration, but without fraud, of a bill, the drawer and acceptor of which prove to be fictitious persons, is intitled to notice. *Leach v. Hewitt*, 4 *Taunt.* 731. Proof of notice will be dispensed with by a promise to pay on the part of the defendant. *Wilkes v. Jacks, Peake*, 202. It seems that

an express promise to pay must be proved, in order to discharge an indorser who has not had notice. *Borrodaile v. Lowe*, 4 *Taunt* 93. Thus the following letter from the indorser was held not to waive the want of notice: "I cannot think of remitting till I receive the draft, therefore if you think proper you may return it to Trevor and Co., if you think me unsafe." *Ibid.* A promise to pay will dispense with the notice, though not made to the plaintiff, but to another person who was holder of the bill at the time. *Potter v. Rayworth*, 13 *East*, 418.

Evidence under the money counts.] An indorsement is *primâ facie* evidence of money lent by the indorsee to his indorser. *Bayley on bills*, 288.

Defence.

The most usual defences in actions on bills of exchange are, 1, Want of consideration. 2, Illegality of consideration. 3, Satisfaction, or release of the bill. 4, Giving time to certain parties. 5, Want of proper stamp. 6, Alteration, *as to which, vide ante "Stamps."* The general issue in actions on bills and notes is abolished by the new rules of H. T. 4 W. 4, which declare that "in all actions on bills of exchange and promissory notes, the plea of *non assumpsit* shall be inadmissible, and that in such actions a plea in denial must traverse some matter of fact, *e. g.*, the drawing, or making, or indorsing, or accepting, or presenting, or notice of dishonour of the bill or note." The same rule has likewise had the effect of abolishing the practice of giving notice that the consideration of the bill will be disputed. The cases, therefore, upon that point, which were contained in the former editions of this work, are now omitted.

Plea of want of consideration—onus probandi.] Since the introduction of the new rules, some doubt has existed with regard to the party upon whom the *onus* of proving the consideration, or want of consideration, ought to rest. The point depends upon the form of the pleadings. Where a general plea of *no consideration* is not demurred to, which it may be, (*see Stoughton v. Earl of Kilmorey*, 2 *Crom. M. and R.* 72, *Mills v. Oddy*, *Id.* 103,) and the plaintiff replies generally to such plea that there was a consideration, (which replication has been held good even on special demurrer, *Prescott v. Levy*, 1 *Moo. and Rob.* 382 (*n.*), *S. C.*), the proof lies upon the defendant, and he is bound in this first instance to prove the want of consideration. *Batley v. Catterall*, 1 *Moo. and Rob.* 379. *Lacey v. Forrester*, 2 *Crom. M. and R.* 59. *Percival v. Framplin*, 3 *Dowl. P. C.* 748. In one case Mr. Justice Littledale ruled the other way, and the plaintiff was nonsuited, but the court granted a rule to show cause why the nonsuit should not be set aside, which was made absolute without opposition. *Morgan v. Cresswell*, 1 *Moo. and Rob.* 380 (*n*).

But where the defendant pleads *no consideration* generally, and the plaintiff, instead of replying *good consideration* generally, alleges in his replication the particular consideration on which he relies, and concludes with a *verification*; then as the defendant must traverse that allegation, it seems that it is incumbent on the plaintiff to prove the issue so denied; and it has been accordingly so ruled. In the above cited case of *Batley v. Catterall,* Mr. Baron Alderson said, "When a plaintiff alleges in his replication, that the bill was drawn for some particular kind of consideration, he must prove his allegation, and so I ruled the other day where the plaintiff had replied that the bill was accepted for the price of goods sold."

A third case has occurred intermediate between the two stated above, where to a general plea of *no consideration* the plaintiff has replied, setting forth the particular consideration *under a videlicet* and concluding to *the country;* as where he pleaded, "that the defendant did receive consideration for the said acceptance, to wit, two cows sold and delivered by the plaintiff to the defendant, and this he prays may be inquired of by the country." Lord Denman, C. J., ruled that the proof of this issue lay on the defendant, and the Court of King's Bench confirmed his ruling. In refusing the rule for setting aside the verdict, Lord Denman said, that the replication was, in fact, merely a traverse of the plea of *no consideration;* and though the plaintiff had gone on and alleged, under a *videlicet,* what the consideration was, he concluded his replication to *the country,* thereby showing that the words, under the *videlicet,* were introduced merely as parcel of the traverse, and not as new matter upon which issue was to be taken, and, in fact, the defendant had by the form of the pleading no opportunity of taking issue upon it. *Low v. Burrows,* 1 *Moo. and Rob.* 381, 4 *Nev. and M.* 366, *S. C.*

Want of consideration, defence between what parties.] The want of consideration *in toto,* or in part, cannot be insisted upon if the plaintiff, or any intermediate party between him and the defendant, took the bill or note, *bonâ fide,* and upon a valid consideration; *Morris v. Lee, Bayley on bills,* 397; and an indorsee for value may recover against the acceptor of an accommodation bill though he knew it to be such. *Smith v. Knox,* 3 *Esp.* 46. *Charles v. Marsden,* 1 *Taunt.* 224. Between immediate parties, as the drawer and acceptor, drawer and payee, indorsee and his immediate indorser, want of consideration may be insisted on. *Chitty on bills,* 91, *5th ed.* In an action by the indorsee against the acceptor, in order to prove no consideration it is not sufficient to show that the drawer on the day before the bill became due procured all the indorsements to be made without consideration, in order that the action might be brought by the indorsee on the understanding

that the money should be divided between one of the indorsees and the drawer. The want of consideration between the defendant and the drawer should be shown. *Whitaker v. Edmunds*, 1 *Ad. and Ell.* 638, 1 *Moo. and R.* 366, *S. C.*

Want of consideration, what, a defence.] A total failure of consideration is a total bar, inadequacy, or a partial failure a bar *pro tanto* only; *Bayley on bills*, 344, 4*th ed.*; and the defendant may pay part into court, and for the rest insist on want of consideration. *Barber v. Backhouse, Peake*, 61, *Wiffen v. Roberts*, 1 *Esp.* 261. But a partial failure of consideration will constitute no defence, if the *quantum* to be deducted is matter not of definite computation but of unliquidated damages. *Bayley on bills*, 395. Thus, where a bill is given for goods, it is no defence that the price is exorbitant; *Solomon v. Turner*, 1 *Stark.* 51; or that the goods were damaged; *Morgan v. Richardson*, 1 *Campb.* 40 (*n*). *Obbard v. Betham, M. and M.* 483. But the defendant may give evidence of fraud, so as to avoid the contract altogether. *Lewis v. Cosgrave*, 2 *Taunt.* 2, *Solomon v. Turner*, 1 *Stark.* 52.

Want of consideration—declarations of former holder when admissible.] In general, the declarations of the former holder of a bill are not admissible to prove the want of consideration. *Shaw v. Broom*, 4 *D. and R.* 730. *Smith v. de Wruitz, R. and M.* 212. *Barough v. White*, 4 *B. and C.* 325. *Beauchamp v. Parry*, 1 *B. and Ad.* 89. But where the title of the plaintiff, and of the party whose declarations are offered in evidence, is identified, as where the plaintiff took the bill from him after it became due, such declarations are admissible. *Benson v. Marshal, cited* 4 *D. and R.* 732. And where the plaintiff did not take the bill after it was due, but sues as agent for the party who made the declarations, such declarations are admissible. *Welstead v. Levy*, 1 *Moo. and Rob.* 138. 1 *B. and Ad.* 89.

Illegality of consideration, a defence between what parties.] In general, this objection is confined to persons, parties, or privies to the illegality, and those to whom they have passed the bill without value; *Bayley on bills*, 410, 4*th ed.*; and a *bonâ fide* indorsee for value, without notice of the illegality, may recover on such bill. *Wyatt v. Bulmer*, 2 *Esp.* 538. In these cases the question for the jury is whether the plaintiff was or was not guilty of gross negligence in taking such a bill. *Crook v. Jadis*, 6 *C. and P.* 191, 3 *Nev. and M.* 257, *S. C.* Where the bill is given for money lost by gaming, or by betting on the side of persons gaming, or knowingly lent for gaming, the contract is void by statute 9 Anne, c. 14, sec. 1, and no one can recover on such a bill against the person losing, but the indorsee may recover against the other parties to the bill. *Edwards v. Dick*, 4 *B. and A.* 212. Where a bill is accepted for the amount of

a bet above 10*l.*, an innocent indorsee cannot sue the acceptor though the bet was on a legal horse race. *Shilleto v. Theed*, 7 *Bingh.* 405, *see* 16 *Car.* 2, *c.* 7. *s.* 3. By statute 58 Geo. 3, c. 93, an indorsee, for value and without notice, of a bill given for an usurious consideration, may sue upon such bill. Where a statute prohibits a thing to be done, and does not expressly avoid the securities which fall within the prohibition, then, if the violation of the law does not appear on the face of the instrument, and the party taking it is ignorant that it was made in contravention of the statute, it is an available security in the hands of such persons. *Per Holroyd, J., Broughton v. Manchester Water Works*, 3 *B. and A.* 10.

Before the 58th Geo. 3, c. 93, the indorsement of a bill for an usurious consideration prevented a subsequent *bonâ fide* indorsee from recovering on the bill, if he claimed through such indorsement. *Lowes v. Mazzaredo*, 1 *Stark.* 385. *Chapman v. Black*, 2 *B. and A.* 589. But since that statute, such an indorsee on proving that he gave a valuable consideration for the bill, may recover upon it. *Wyatt v. Campbell, Chitty's Stat.* 121 (*n*), *M. and M.* 80, *S. C.*

Where the defence is usury in the indorsement, the usury must be clearly proved; *suspicion* is not sufficient, and the declarations of a party who discounted the bill, but is not proved to be the agent of the party, are inadmissible. *Bassett v. Dodgin*, 10 *Bingh.* 40.

Where a bad plea of *no consideration* generally is pleaded, and not demurred to, the defendant is at liberty under it to prove circumstances of fraud, showing that the contract in respect of which the bill was given was avoided *ab initio* by such fraud. *Mills v. Oddy*, 2 *Crom. M. and R.* 103.

Illegality of consideration going to part only.] If part of the consideration is illegal, the bill cannot be put in suit; *Scott v. Gillmore*, 3 *Taunt.* 226; *Cruickshanks v. Rose*, 1 *Moo. and Rob.* 101. *Bayley on bills*, 436, 4*th ed.*; but if part of the *consideration* is good, the plaintiff may recover on that, though not on the bill. *Robinson v. Bland*, 2 *Burr.* 1077.

Illegality of consideration—substituted bills.] If a new bill is substituted for one which was given upon an illegal consideration it will be subject to the same objections as the original bill, unless it is reformed, so as to exclude what made it illegal; though the new bill is given to an indorsee who took the first security innocently and for value, especially if since apprised of the illegality in the first bill. *Chapman v. Black*, 2 *B. and A.* 588. *Bayley on bills*, 407. But where a bond or note is void, on account of its being a security for usurious interest, a subsequent security for no more than the principal and legal interest is binding. *Per Holroyd, J., Preston v. Jackson*, 2 *Stark.* 238. *Barnes v. Hedley*, 2 *Taunt.* 184.

Wicks v. Gogerly, R. and M. 123. If a bill or note is given in part upon an illegal consideration, and several bills or notes are afterwards substituted in lieu thereof, the effect of the illegality may be confined to some only of the substituted bills or notes, and the others stand exempt. Thus, where a bill or note is given, as to half for a gaming debt, and, as to the residue, for money lent, and two bills or notes, of equal amount, are afterwards substituted for it, if the giver does anything which may be considered an election to ascribe the gaming debt to the one, he will be liable upon the other. *Hubner v. Richardson, Bayley on bills*, 409.

In an action by the indorsee against the maker of a promissory note, letters from the payee to the maker, contemporaneous with the making of the note, are evidence to prove usury in the concoction of the note. *Kent v. Lowen*, 1 *Campb.* 177, 180, *d*; *see* 1 *Barn. and Adol.* 89.

Satisfaction.] The acceptor may prove, in bar of the action, that the holder has received satisfaction from the drawer, provided the drawer be not also the payee; *Beck v. Robley*, 1 *H. Bl.* 89 (*n*); but if the drawer be also the payee, he may, after taking up the bill, re-issue it, and the acceptor will be liable to the indorsee. *Callow v. Lawrence*, 3 *Mau. and S.* 95. It seems that twenty years will not afford a presumption that a bill, or note, has been satisfied, where the statute of limitations is not pleaded. *Du Belloix v. Lord Waterpark*, 1 *D. and R.* 17, *see ante p.* 18. A judgment against a subsequent party to a bill will not discharge a prior party; it is only an extinguishment between the parties to the judgment; *Bayley on bills*, 267, 4*th ed.*, *Hayling v. Mullhall*, 2 *W. Bl.* 1235, *English v. Darley*, 2 *B. and P.* 62; so the holder may sue the drawer after taking the acceptor in execution. *Ibid.* *Macdonald v. Bovington*, 4 *T. R.* 825. A composition with the acceptor, and the taking a third person's note as a security for the composition money, operate as a satisfaction of the bill. *Lewis v. Jones*, 4 *B. and C.* 513. *Perfect v. Musgrave*, 6 *Price*, 111.

If a bill is renewed by the acceptor, on the terms of his paying the costs of an action brought upon it, and these costs are not paid, the holder of the bill may sue the acceptor, though the second bill is outstanding in the hands of an indorsee. *Norris v. Aylett*, 2 *Campb.* 329. But taking a new bill from the acceptor, the original bill to be kept as a security, operates as an agreement that, in the mean time, the original bill shall not be enforced. *Per Lord Ellenborough*, *Gould v. Robson*, 8 *East*, 580; *see Dillon v. Rimmer*, 1 *Bingh.* 100. So where the first bill is "renewed" by taking a second. *Kendrick v. Lomax*, 2 *Crom. and J.* 405. But where one of three partners, after a dissolution of partnership, undertook, by deed, to pay a particular partnership debt on two bills of exchange,

which was communicated to the holder, who consented to take the separate notes of the one partner for the amount, strictly *reserving his right against all three*, and retaining possession of the original bills, it was held that the separate notes having proved unproductive, he might resort to his remedy against the other partners, and that the taking the separate notes, and afterwards renewing them several times successively, did not amount to satisfaction of the joint debt. *Bedford v. Deakin*, 2 *B. and A.* 210. So where on a bill of exchange being dishonoured, the acceptor transmitted a new bill for a larger amount to the payee, but had not any communication with him respecting the first, and the payee discounted the second bill with the holder of the first, which he received back as part of the amount, and afterwards, for a valuable consideration, indorsed it to the plaintiff, it was held that the second bill *was merely a collateral security*, and that the receipt of it by the payee did not amount to giving time to the acceptor of the first bill, so as to exonerate the drawer. *Pring v. Clarkson*, 1 *B. and C.* 14; *see also Featherstone v. Hunt*, 1 *B. and C.* 113. Satisfaction as to one of several partners is a satisfaction as to all. *Jacaud v. French*, 12 *East*, 317.

Release and waiver.] A release to a subsequent party will not discharge a prior party to the bill. *Carstairs v. Rolleston*, 1 *Marsh.* 207, 5 *Taunt.* 551, *S. C. Smith v. Knox*, 3 *Esp.* 47. An agreement to consider an acceptance "at an end;" *Walpole v. Pulteney, cited* 1 *Dougl.* 249; or a message to the acceptor of an accommodation bill, that the business was settled with the drawer, and he need give himself no farther trouble, is an express waiver, and a good defence in an action against the acceptor; *Black v. Peele, cited* 1 *Dougl.* 248; but a declaration by the holder, that he should look to the drawer for payment, and that he wanted no more of the acceptor than another debt not connected with the bill, will not be sufficient to discharge the acceptor; *Parker v. Leigh*, 2 *Stark.* 228; and if the holder receives part of the money from the drawer, and takes a promise from him, upon the back of the bill, for the payment of the residue at an enlarged time, it is for a jury to say whether this is not a waiver of the acceptance; *Ellis v. Galindo, cited* 1 *Dougl.* 250; *Bayley on bills*, 165, 4*th ed.*; *but see Dingwall v. Dunster*, 1 *Dougl.* 247; where it was held, that nothing but an *express* declaration by the holder will discharge the acceptor. *See also Parker v. Leigh.* 2 *Stark.* 228. *Adams v. Gregg*, 2 *Stark.* 531. *Farquhar v. Southey, M. and M.* 14.

Giving time.] Giving time to a principal discharges a surety, and therefore the giving time to the acceptor discharges the drawer and indorsers. *English v. Darley*, 2 *B. and P.* 61. Thus if the holder takes another bill from the acceptor at a

short date, and agrees to keep the original bill in his hands as a security, it is a discharge to the indorsers. *Gould v. Robson,* 8 *East,* 576; *ante p.* 217, *and see the other cases there cited.* But a conditional agreement to give time to the acceptor, on his paying part, which condition is not performed by the acceptor, is not a discharge to the indorsers. *Badnall v. Samuel,* 3 *Price,* 521. An assent by the drawer or indorser to the giving time; *Clarke v. Devlin,* 3 *B. and P.* 363; *see Withall v. Masterman,* 2 *Campb.* 178; or a promise to pay the bill, with a knowledge of time having been given; *Stevens v. Lynch,* 12 *East,* 38; will prevent the giving time from operating as a discharge. Forbearance to sue the acceptor will not of itself be a discharge. *Walwyn v. St. Quintin,* 1 *B. and P.* 652. *English v. Darley,* 2 *B. and P.* 62. 3 *Price,* 533. Taking a *cognovit* from the acceptor, by which the time of obtaining judgment against him is not deferred, is not such a giving of time as will discharge the drawer. *Jay v. Warren,* 1 *Carr. and P.* 532. *Price v. Edmunds,* 10 *B. and C.* 579. *Lee v. Levi,* 4 *B. and C.* 390. 5 *Taunt.* 319. The taking a warrant of attorney from the acceptor, after action brought against the indorser, could not, even before the new rules, be given in evidence under the general issue in the latter action, being matter of defence arising after action brought. *Lee v. Levi,* 4 *B. and C.* 390.

Where a bill was accepted for the accommodation of the drawer, and the holder, knowing that circumstance, gave time to the *drawer*, Lord Ellenborough held the acceptor discharged; *Laxton v. Peat,* 2 *Campb.* 185; *Collot v. Haigh,* 3 *Campb.* 281; but this case has been frequently doubted. *Raggett v. Axmore,* 4 *Taunt.* 730, *Fentum v. Pocock,* 5 *Taunt.* 192, *Kerrison v. Cooke,* 3 *Campb.* 362; *but see Adams v. Gregg,* 2 *Stark.* 531; *Rolfe v. Wyatt,* 5 *C. and P.* 181; *see also Hill v. Read, D. and R., N. P. C.* 26. And it has been lately held that notwithstanding a release to the accommodated drawer, the holder who knew (at the time of the release, but not when he took the bill) that it was an accommodation bill, may sue the acceptor. *Harrison v. Courtauld,* 3 *B. and Ad.* 36. *Nichols v. Norris, Id.* 41. Where time was given to the accommodation *acceptor*, Lord Ellenborough ruled that the drawer was not discharged. *Collot v. Haigh,* 3 *Campb.* 281. So where the acceptor is the agent of the drawer, the latter will not be discharged by time given to the former. *Clarke v. Noel,* 3 *Campb.* 411.

Competency of Witnesses.

Drawer.] In an action against the acceptor, the drawer is in general a competent witness, either for the plaintiff or for the defendant; for, if the plaintiff recovers, the drawer pays the bill by the hands of the acceptor; if the plaintiff fails, the drawer is liable to pay the bill himself. *Bayley on bills,* 149.

Thus, he may be called by the plaintiff to prove the defendant's handwriting; *Dickinson v. Prentice*, 4 *Esp.* 32; or by the defendant to prove that the plaintiff discounted the bill on an usurious consideration; *Brard v. Ackerman*, 5 *Esp.* 119; *Rich v. Topping, Peake*, 224, 1 *Esp.* 177, *S. C., Bayley on bills*, 420; or that the bill has been paid; *Humphrey v. Moxon, Peake*, 52; *see also Williams v. Keats, Mann. Index*, 328; and it is no objection that he is a prisoner on a charge of having forged the bill. *Barber v. Gingell*, 3 *Esp.* 62. But where the acceptor has accepted the bill for the accommodation of the drawer (the witness), the latter is not a competent witness for the defendant, for if the plaintiff should fail, the witness would be discharged from his liability to indemnify the defendant against the costs of the action on the bill. *Jones v. Brooke*, 4 *Taunt.* 464. *Hardwick v. Blanchard, Gow*, 113. Where the witness has become bankrupt, and the costs are proveable under the commission, and he has obtained his certificate, he is then admissible. *Brind v. Bacon*, 5 *Taunt.* 183. *Moody v. King*, 2 *B. and C.* 558. Where a bill has been drawn by one partner, in fraud of the rest, to pay a separate creditor, a copartner is a competent witness for the acceptor, in an action against him by the creditor, to prove the want of authority. *Ridley v. Taylor*, 13 *East*, 176.

Where the defence was a gaming consideration, the drawer was called by the defendant. It was objected that he was interested to defeat the plaintiff, being liable for treble penalties if he recovered, but not if he failed. But it was held, that the witness was competent, since if the plaintiff failed, the witness was liable to him; if he succeeded, the witness might deliver himself from the penalties by refunding within the time. *Habner v. Richardson, Holroyd, J.*, 1818, *Manning's Index*, 327.

Indorser.] In an action by the indorsee against the drawer or acceptor, the indorser is in general a competent witness, either for the plaintiff or the defendant; for the plaintiff, because though the plaintiff's succeeding in the action *may* prevent him from calling for payment from the indorser, it is not certain that it will, and whatever part of the bill or note the indorser is compelled to pay, he may recover again from the drawer or acceptor;—for the defendant, because, if plaintiff fails against drawer or acceptor, he is driven either to sue the indorser, or to abandon his claim. *Bayley on bills*, 422. For the plaintiff he may be called to prove his own indorsement; *Richardson v. Allan*, 2 *Stark.* 334; or upon a bill drawn for his own accommodation, that the plaintiff, the indorsee, gave him value for it; *Shuttleworth v. Stephens*, 1 *Campb.* 408; or that the defendant promised to pay the bill after it became due. *Stevens v. Lynch*, 2 *Campb.* 332. For the defendant

the indorser may be called to prove that he had paid the bill; *Charrington v. Milner, Peake*, 6, *Birt v. Kershaw*, 2 *East*, 458; or that an unstamped bill, dated abroad, was in fact made here. *Jordaine v. Lashbrooke*, 7 *T. R.* 601.

In an action by the indorsee against the acceptor, the indorser, though released by the defendant, was held incompetent to prove that he delivered the bill to the plaintiff merely for the purpose of procuring payment, as agent for the witness. *Buckland v. Tankard*, 5 *T. R.* 578. But this decision has been doubted. *Birt v. Kershaw*, 2 *East*, 458. 1 *Phill. Ev.* 63, 6*th ed. See Fancourt v. Bull*, 1 *Bingh. N. C.* 681.

In an action against the indorser of a bill, a prior indorser, for whose accommodation the bill was indorsed by the defendant, and who has become bankrupt and obtained his certificate, is a competent witness for the defendant; since the amount of the bill and the costs sustained by the defendant are proveable against the estate of the witness (694 c. 16, s. 52). *Bassett v. Dodgin*, 9 *Bingh.* 653.

Drawee or acceptor.] The acceptor is a competent witness for the plaintiff, to prove that he had no effects of the drawer, the defendant, in his hands; *Staples v. Okines*, 1 *Esp.* 332; for though the plaintiff recovers, the witness remains liable to the defendant. So the drawee may be called to prove the same fact. *Legge v. Thorpe*, 2 *Camph.* 310. In an action against a drawer, it has been held that the acceptor is not a competent witness for the defendant, to prove a set-off, on the ground that he is answerable to the drawer only to the amount which the plaintiff recovers against the defendant; *Mainwaring v. Mytton*, 1 *Stark.* 83, *sed quære;* for it seems that the drawer would be entitled to call upon the acceptor for the full amount of the bill. *Bayley on bills*, 424. *See Reid v. Furnival*, 1 *Crom. and M.* 538, *ante p.* 191. It seems that a statement by the drawee, as to the drawer, the defendant, not having effects in his hands, is evidence against the drawer, if made at the time of presentment, but not if made subsequently; *Prideaux v. Collier*, 2 *Stark.* 57; on the ground that the drawee is for that purpose the agent of the drawer.

In an action against the drawer and indorser of a bill, the acceptor was called for the defendant to prove, that after being accepted by him and indorsed by the defendant, the bill was put into his (the acceptor's) hands for the purpose of getting it discounted, that he took it for that purpose to the plaintiff, who having got hold of it refused either to discount or return it. It was objected that the witness was incompetent on the ground of interest, and Lord Tenterden rejected him. The Court of King's Bench refused a rule for a new trial moved for on the ground that the witness was improperly rejected. Per Lord Tenterden, " I am of opinion that the

testimony was properly rejected. It appeared by the statement of the defendant's counsel, that the witness was answerable for the payment of the bill by himself, and there was an implied undertaking by him to indemnify Lowe (the drawer and defendant). He was, therefore, interested in the result of the action, inasmuch as the costs, if the plaintiff succeeded, would ultimately fall on himself." *Edmonds v. Lowe*, 8 *B. and C.* 407.

ASSUMPSIT ON PROMISSORY NOTES.

In general, the rules relating to the proof of the drawing, indorsing, presentment, and notice of dishonour of bills of exchange, apply also to promissory notes. Where a different rule prevails, the distinction will be noticed.

In an action on a promissory note, the note must be produced and proved, *see ante p.* 190, and any material variance between the statement and proof will be fatal, *see ante p.* 191, *to p.* 194.

Payee against Maker.

In an action on a promissory note, by the payee against the maker, the plaintiff must prove the making of the note by the defendant, if that fact be traversed, and in some cases, a presentment of the note at a certain place.

The making of the note.] The making of the note will be proved by proving the handwriting of the defendant, *see ante p.* 87; or, if made by an agent, by proof of the handwriting and authority of such agent. If the note is for less than 5*l.* it must be attested by a subscribing witness, 7 Geo. 3, c. 30, s. 1, and such attesting witness must be called; or if dead, or he cannot be found, *ante p.* 82, his handwriting must be proved, and some evidence must be given of the identity of the maker of the note. An admission by the defendant that the handwriting is his, will be sufficient proof, in the case of an unattested note, though it was made pending a treaty for a compromise. *Waldridge v. Kennison*, 1 *Esp.* 143. An offer on the part of the defendant, after the note has become due, to give another note to the plaintiff, instead of it, is an admission of the plaintiff's title. *Bosanquet v. Anderson*, 6 *Esp.* 43. An admission of his signature, by one of the parties, will only be evidence against himself. *Gray v. Palmers*, 1 *Esp.* 135.

Presentment.] Where the promise to pay is general, no presentment to the maker need be stated or proved. But where the note contains, in the body of it, and not merely in a memorandum at the foot, a promise to pay at a particular place,

a presentment at such place must be proved, but notice to the maker of the dishonour is unnecessary, *Pearce v. Pemberthy*, 3 *Campb.* 261. Circumstances which would excuse the presentment, as that the maker could not be found, cannot be given in evidence under the general allegation of presentment; *Leeson v. Pigott, Bayley on bills,* 324; *and see Smith v. Bellamy,* 2 *Stark.* 223; *Hine v. Allely,* 4 *B. and Ad.* 624, *ante p.* 204: but if a note be made payable at a particular town, and the maker has no residence there, a presentment at the banking-houses there will justify and support an allegation that it was presented there to the maker. *Hardy v. Woodroofe*, 2 *Stark.* 319. *Bayley on bills*, 324. A note payable at two places may be presented at either. *Beeching v. Gower*, *Holt*, 313. In an action on a note payable on demand, a demand need not be alleged or proved, for the action itself is a demand. *Rumball v. Ball*, 10 *Mod.* 38. Where a promissory note was in the following form: "I promise to pay to M. A. D. or bearer, on demand, the sum of 16*l. at sight*;" it was held that an action was not maintainable, without a presentment for sight. *Dixon v. Nuttall*, 1 *Crom. M. and R.* 307.

Evidence under the common counts.] A promissory note is evidence of money lent by the payee to the maker. *Bayley on bills*, 286. Where a note cannot be given in evidence for want of a proper stamp, the plaintiff may recover on the consideration of the note, if the declaration contains counts on such consideration, and if he is not precluded from availing himself of them by the terms of his particular. *Wilson v. Kennedy*, 1 *Esp.* 245. *Farr v. Price*, 1 *East*, 58. *Wade v. Beasley*, 4 *Esp.* 7. The plaintiff will not be allowed to resort to the money counts, if the note has been lost, unless he can prove it destroyed, or show that the defendant cannot be again subjected to the payment of it. *Dangerfield v. Wilby*, 4 *Esp.* 159, *ante p.* 190.

Indorsee against Maker.

In an action on a promissory note, by an indorsee against the maker, the plaintiff must prove the making of the note by the defendant, *see ante p.* 190, and the indorsement stated in the declaration, if those facts be traversed.

It has been already stated in what manner an indorsement is to be proved, *ante p.* 197, what indorsements are good, *ante p.* 199, and what need be proved, *ante p.* 200, as well as in what cases the plaintiffs must prove that they are in partnership, *ante p.* 200. In declaring upon a note made to payee or *bearer*, the indorsements need not be mentioned, but if stated, they must, if traversed, be proved. *Waynam v. Bend*, 1 *Campb.* 175; *see Tanner v. Bean*, 4 *B. and C.* 312.

Evidence under the common counts.] It is said that a promissory note is *primâ facie* evidence of money had and received by the maker to the use of the holder; *Bayley on bills*, 287; but Lord Ellenborough was of opinion, that the indorsee could not recover against the maker on the money counts, as he was not an original party to the note, and there was no evidence of any value received by the defendant from him. *Waynam v. Bend*, 1 *Campb.* 175; *see ante p.* 201.

Indorsee against Indorser.

In an action by an indorsee against the indorser of a promissory note, the plaintiff must prove the defendant's indorsement if traversed, the presentment to the maker and his default, and notice to the defendant of the dishonour.

Indorsement.] In what manner an indorsement must be proved has been already stated, *ante p.* 197. It admits all prior indorsements, *ante p.* 198, and also the handwriting of the maker. *Free v. Hawkins, Holt, N. P. C.* 550. When an indorsement is attested (on a note for payment of less than 5*l.*), it must be proved by the subscribing witness. As to what indorsements it is necessary to prove, *see ante, p.* 200.

Presentment.] In what manner a promissory note or bill of exchange must be presented, has already been stated, *ante p.* 202. Where a note is made payable *in the body of it* at a particular place, it must be presented there, *ante p.* 203. As to proof of the maker's default, *see ante p.* 204.

Notice of dishonour.] It has been before stated by and to whom, *ante p.* 205, and within what time, *ante p.* 206, notice must be given, as also what will be considered sufficient proof of the delivery of the notice, *ante p.* 207, and of its contents, *ante p.* 208. It has also been shown in what cases proof of notice may be dispensed with by an acknowledgment on the part of the defendant of his liability, *ante p.* 209. Where the payee of a note indorses it for the accommodation of the maker, it is still necessary to give notice to the payee in order to charge him, and it is no defence that it was agreed between the parties that the note should not be put in force. *Free v. Hawkins*, 8 *Taunt.* 92.

Evidence under the common counts.] An indorsement is evidence of money lent by the indorsee to the indorser. *Kessebower v. Tims, Bayley on bills*, 288.

Competency of Witnesses.

Maker.] The maker of a promissory note is a competent witness for the plaintiff, in like manner as the acceptor of a

bill of exchange, *ante p.* 221; and one of the joint makers of a note is a competent witness for the plaintiff, to prove the signature of the defendant, the other joint maker. *York v. Blott*, 5 *Mau. and S.* 71. In an action by the indorsee against the payee of a note, the maker may be called to prove an alteration; *Levi v. Essex*, 2 *Esp. Dig.* 211, 4*th ed.*; and he may be called to prove a notice, in an action, by indorsee against indorser. *Venning v. Shuttleworth, Bayley on bills*, 422.

Indorser.] The indorser of a note is in general a competent witness either for the plaintiff or defendant, in an action by a subsequent indorsee against the maker, *ante p.* 220. But the payee of a note made for his accommodation, who has become bankrupt and obtained his certificate, subsequently to the date of the note, is not a competent witness for the defendant, the maker, to prove that the note was indorsed to the plaintiff after it became due, for he is no longer liable to the plaintiff, though he still remains liable to the defendant, if the latter should be compelled to pay the note. *Maundrell v. Kennet*, 1 *Campb.* 408 (*n*). But the payee of an accommodation note, who has indorsed it to the plaintiff, is a competent witness for the plaintiff to prove that he indorsed it for a valuable consideration, since he has an equal interest on each side. If the plaintiff succeeds, the witness becomes liable to the defendant; if the defendant succeeds, the witness remains liable to the plaintiff. *Shuttleworth v. Stephens*, 1 *Campb.* 407.

ASSUMPSIT ON POLICIES OF INSURANCE.

In suing on a policy of insurance the plaintiff must prove such of the facts denied upon the pleadings as are necessary to substantiate his title, *viz.*, 1, The execution of the policy by the defendant. 2, The interest of the party as averred. 3, The inception of the risk, and, in some cases, compliance with warranties and a license. 4, The loss.

Proof of the policy.] The policy, if the execution of it is denied, must be produced and proved, and if subscribed by an agent of the defendant, the handwriting and authority of the agent must be proved. If the authority was in writing it should be produced and proved. The authority may also be proved by showing that the defendant has recognised the act of the agent in this instance, or in other similar instances in which the agent has subscribed policies for the defendant; *Neale v. Irving*, 1 *Esp.* 61; and where a witness stated that he was authorised by power of attorney, but added that the defendant had been in the habit of paying losses upon policies which the

witness had subscribed in his name, Lord Ellenborough ruled that the power of attorney need not be produced. *Haughton v. Ewbank*, 4 *Campb.* 88, *see Brocklebank v. Sugrue*, 5 *C. and P.* 21. Where a witness proved the agent's handwriting, and swore that he had often observed him sign policies for the defendant, but he had not seen any general power of attorney from the defendant to the agent, nor did he know that the defendant had given the agent any authority to sign the specific policy, nor was he acquainted with any instance in which the defendant had paid a loss upon a policy so subscribed, Lord Ellenborough held that the proof of agency must be carried further. *Courteen v. Touse*, 1 *Campb.* 43.

Parol evidence of what passed at the time of effecting the policy is inadmissible; *Weston v. Emes*, 1 *Taunt.* 115; though evidence of the custom of trade may be received, *ante p.* 12. Thus where the question was as to when the risk determined, Lord Mansfield ruled, that insurance brokers and others might be examined as to the general opinion and understanding of persons concerned in the trade, though they know no particular instance, in fact, upon which such opinion was founded. *Camden v. Cowley*, 1 *W. Bl.* 417. *Vide ante p.* 123.

Interest in the ship, how proved.] The interest in the ship, as stated in the declaration, may be proved, *primâ facie*, by evidence of possession of the ship, or of acts of ownership, as directing the loading of the ship, purchasing the stores, paying the people employed, &c. *Amery v. Rogers*, 2 *Esp.* 207. *Thomas v. Foyle*, 5 *Esp.* 88. The ordinary mode of proof is to call the captain, who will prove that he was appointed and employed by the parties; and though it should appear, on cross-examination, that the parties claim under a bill of sale, it is not on that account necessary for the plaintiff to produce the bill of sale, or the ship's register, unless such further evidence should be rendered necessary in support of the *primâ facie* case of ownership, in consequence of the adduction of contrary proof on the other side. *Robertson v. French*, 4 *East*, 137. The certificate of registry is not even *primâ facie* evidence of ownership. *Pirie v. Anderson*, 4 *Taunt.* 652. Where the interest is averred in parties who have never been in possession of the ship, it will be necessary to prove the ownership of the persons from whom such parties claim, and the derivative title from them, *viz.* the bill of sale, and the registry of the ship according to the register acts (see the last register act, 6 Geo. 4, 110), *and see ante p.* 80, the section as to the copies of affidavits and registers.

Interest in goods, how proved.] The interest in the goods may be proved *primâ facie*, like the interest in the ship, by evidence of possession and acts of ownership. It is also fre-

quently proved by the production of the bill of lading. A bill of lading directing the delivery of the goods to the consignee is evidence of interest in him, and where made deliverable to the consignor, and indorsed by him either specially or in blank, it is evidence of interest in the indorsee, or holder; *M'Andrew v. Bell,* 1 *Esp.* 373; *Lickbarrow v. Mason,* 2 *T. R.* 71; but if the master qualifies his acknowledgment by the words "contents unknown," the bill of lading will not be evidence. *Haddow v. Parry,* 3 *Taunt.* 303. The signature of the master to the bill of lading must be proved, and also the indorsement, when the party claims under it. If the master is dead, proof of his death and handwriting is sufficient evidence of interest. *Haddow v. Parry,* 3 *Taunt.* 303. Where to prove property in a cargo the plaintiff produced a bill of parcels of one Gardiner at Petersburgh, with his receipt to it, and proved his hand, Lee, J. C., admitted the evidence. *Russell v. Boheme,* 2 *Str.* 1127. By statute 5 Geo. 4, c. 94, s. 2, any person (after 1st Oct. 1826) intrusted with, and in possession of any bill of lading, dock warrant, &c., warrant or order, for delivery of goods, shall be deemed and taken to be the true owner of the goods, so as to give validity to any contract for sale of the goods, or any deposit or pledge, provided there be no notice, by the documents themselves, that the person intrusted, as aforesaid, was not the actual owner. *See Wright v. Campbell,* 4 *Burr.* 2047.

Interest, variance in proof of.] A material variance in proof from the allegation of interest will be fatal. Thus, where it is averred that the interest is in a single person, and that the policy was made on his account, and for his use and benefit, and it is proved that the interest is in several, and that the policy was made on their joint account, it is a fatal variance. *Bell v. Ansley,* 16 *East,* 141; *see Carruthers v. Sheddon,* 1 *Marsh.* 416, 6 *Taunt.* 14, *S. C.* But if it be averred that the plaintiff was interested at the time of effecting the policy, it is sufficient to show that he was interested at the commencement of the risk. *Rhind v. Wilkinson,* 2 *Taunt.* 237. Where a policy averred the interest to be in A. B., who was interested at the time, it is sufficient to prove an adoption of the policy by A. B. after the loss. *Hagedorn v. Oliverson.* 2 *Mau. and S.* 485.

Inception of the risk.] Where a vessel is lost in the course of a voyage for which she is insured, some proof of the inception of the voyage or risk must be given. *Koster v. Innes, R. and M.* 336. This may probably be proved by some of the crew, or proof of a particular destination by charter-party would afford a presumption that she sailed on the chartered voyage; so proof of her clearing out for a particular port is

evidence that she set sail for that port when she dropped from her moorings. *Per Lord Ellenborough, Cohen v. Hinckley*, 2 *Campb.* 52. *Marsh. Ins.* 715. So proof of a convoy bond for a particular port, signed by the captain, coupled with the evidence of the custom-house officer that a certificate and other papers for such a voyage would, in the regular course of office, be delivered to the captain before he sailed, together with proof of the sailing, has been held evidence of the ship having sailed on such voyage. *Cohen v. Hinckley*, 2 *Campb.* 51. A license for the port mentioned in the policy is evidence to the same effect. *Marshall v. Parker*, 2 *Campb.* 69. If the declaration aver that the ship sailed *after* the making of the policy, but in fact it was before, the variance is not material. *Peppin v. Solomons*, 5 *T. R.* 496. A policy on a ship "at and from" a place attaches during her stay there before she sails; *Palmer v. Marshall*, 8 *Bingh.* 79; but where the policy is on *freight* "at and from," &c., it attaches only when the ship is at the place in a condition to begin to take in her cargo. *Williamson v. Innes, ibid.* 81 (*n*); 1 *Moo. and Rob.* 88, *S. C.*

Shipment of the goods.] The shipment of goods on board is usually proved by the captain, and, if he be dead, the production of the bill of lading and proof of his handwriting will be evidence of the shipping as well as of the interest. *Haddow v. Parry*, 3 *Taunt.* 306. But where the bill of lading was offered in evidence to prove that the goods *were shipped* on the plaintiff's account, Lord Ellenborough rejected it, as being nothing more than the declaration of the captain. (It does not appear whether the captain was dead). *Dickson v. Lodge*, 1 *Stark.* 226. The copy of an official paper made in pursuance of an act of parliament, by an officer of the customs, containing an account of the cargo, and a report of the goods on board, is evidence to prove the shipping. *Johnson v. Ward*, 6 *Esp.* 49.

In an action upon a policy on freight, the assured must show that some freight would have been earned, either by proving that some goods were put on board, or that there was some contract for doing so. *Flint v. Flemyng*, 1 *B. and Ad.* 48.

Compliance with warranties.] Where the policy contains a warranty, a literal and strict compliance with it must be proved; it is not sufficient to show something tantamount to a performance. *Pawson v. Watson*, *Cowp.* 785; 2 *Saund.* 200, *c* (*n*); *see Weir v. Aberdein*, 2 *B. and A.* 320. To satisfy a warranty "to depart" on or before a particular day, the vessel must be out of port on or before that day; a warranty "to sail" is satisfied by the ship breaking ground and getting under-weigh. *Moir v. Roy. Ex. Ass. Co.*, 3 *Mau. and S.* 461, 6 *Taunt.* 241; *and see Lang v. Anderdon*, 3 *B. and C.* 495. But

unless she is unmoored, the warranty to sail is not complied with. *Nelson v. Salvador, M. and M.* 309. Sailing before the vessel has got her clearances, and is equipped for the voyage, is not a sailing within the warranty. *Ridsdale v. Newnham*, 3 *Mau. and S.* 456. It is not satisfied by the ship leaving the harbour on the day without a sufficient crew on board, though the remainder of the crew are engaged and ready to sail. *Graham v. Barras*, 3 *Nev. and M.* 125. Where a vessel sailed from St. Anne's, Jamaica, within the time of warranty, with her cargo and clearances on board, and called at Bluefields, another port in Jamaica, for convoy, where she was detained by an embargo till after the time of warranty, it was held that this was a sufficient sailing from Jamaica. *Bond v. Nutt, Cowp.* 601; *Thellusson v. Fergusson*, 1 *Dougl.* 361. Where the warranty is to sail on a certain voyage not after a certain day, it is complied with by getting out of the dock, and endeavouring to leave the harbour in the prosecution of the voyage. It might be otherwise if the warranty were to sail from some particular *terminus*. *Cockrane v. Fisher*, 1 *Crom. M. and R.* 809.

To prove the sailing with convoy, the log-book, or the official letter of the commander of the convoy, is evidence. *D'Israeli v. Jowett*, 1 *Esp.* 427; *Watson v. King*, 4 *Campb.* 275.

In order to prove a warranty that the ship insured is of a particular nation, proof of her carrying the flag of that nation, at times when she was free from the danger of capture, and that the captain addressed himself to the consul of that nation in a foreign port, is *primâ facie* evidence. *Arcangelo v. Thompson*, 2 *Campb.* 620. Under a warranty of neutrality it is sufficient to show that the ship was neutral when the risk commenced. *Eden v. Parkison*, 2 *Dougl.* 732, *a*.

There are also certain implied warranties, the breach of which will prevent the plaintiff from recovering, as that the vessel is seaworthy; but it is sufficient if she is seaworthy at the time of sailing. *Annen v. Woodman*, 3 *Taunt.* 299. *Primâ facie* a ship is to be deemed seaworthy; *Parker v. Potts*, 3 *Dow*, 31; but where the inability of the ship to perform the voyage becomes evident in a short time from the commencement of the risk, the presumption is, that it arises from causes existing before her setting sail on the intended voyage, and that the ship was not then seaworthy, and the *onus probandi*, in such case, rests with the assured to show that the inability arose from causes subsequent to the commencement of the voyage. *Per Ld. Eldon, Watson v. Clark*, 1 *Dow*, 344; *see also Douglas v. Scougall*, 4 *Dow*, 269. So the insured are not entitled to recover unless they equip the ship with every thing necessary to her navigation during the voyage. *Per Ld. Kenyon, Law v. Hollinsgworth*, 7 *T. R.* 161. *Forshaw v. Chabert*, 3 *B. and*

B. 166. *Tait v. Levi*, 14 *East*, 481. A ship is not fit for a voyage unless she sails with a complete crew; a crew competent for the voyage, considering its length and the circumstances under which it is undertaken. *Per Ld. Tenterden, Clifford v. Hunter, M. and M.* 103. Therefore, where on a voyage from the Mauritius to London, there was no one on board competent to supply the captain's place, in case of illness, the underwriters were held to be discharged. *Ibid.* But where the assured has once provided a sufficient crew, the negligence of the crew at the time of the loss is no breach of the implied warranty. *Busk v. Roy. Ex. Ass.* 2 *B. and A.* 73. There is no implied warranty on the part of the owner of goods insured, that the ship shall be in all respects properly documented. *Carruthers v. Gray*, 3 *Campb.* 142. Where a question arises as to the seaworthiness of a ship, ship-builders who have never seen the ship may state their opinion on examining a survey taken by others, it being a matter of skill and science. *Beckwith v. Sydebotham*, 1 *Campb.* 117; *Thornton v. Roy. Ex. Ass. Co., Peake*, 26, *vide ante p.* 123. As to the effect of a sentence of a foreign Court of Admiralty in negativing a warranty of neutrality, *vide ante p.* 129.

A memorandum written on a separate piece of paper and inclosed in the policy cannot be considered a warranty. *Pawson v. Barnevelt*, 1 *Dougl.* 12 (*n*). But it is immaterial whether the warranty is on the margin or in the body of the policy. *Bean v. Stupart*, 1 *Dougl.* 11. *De Hahn v. Hartley*, 1 *T. R.* 343. A warranty may be waived by a memorandum on the policy without a new stamp. *Hubbard v. Jackson*, 4 *Taunt.* 174. *Weir v. Aberdein*, 2 *B. and A.* 325; *ante p.* 159.

License.] Where the voyage has been legalised by a license, such license must be produced and proved. Where a license granted by the governor of a foreign colony has been lost, parol evidence of its contents is admissible. *Kensington v Inglis*, 8 *East*, 273; *ante p.* 3. But where a license has been granted by the secretary of state in this country (pursuant to 48 Geo. 3, c. 126), parol evidence is not admissible, for there must be some register of it preserved in the office of the secretary of state, which would be better than parol evidence, and if the license was under the sign manual, still some register of it would be preserved. *Rhind v. Wilkinson*, 2 *Taunt.* 243. By the above-mentioned statute a duplicate of the order in council, authorising the grant of the license, is to be annexed to it; if the license is lost, examined copies of the order in council from the council books, and of the license in the office of the secretary of state, must be produced, as the best secondary evidence, and it must be proved that the license put on board the ship is lost. *Eyre v. Palsgrave*, 2 *Campb.* 606. Proof that a vessel, warranted to carry a French license, remained

at Bordeaux a month after the inspection of the document purporting to be a French license, and of other documents, by the officers of the French government, is *primâ facie* evidence that the document is genuine. *Everth v. Tunno*, 1 *Stark*. 508. The license must be shown to apply to the voyage in question. *Barlow v. M'Intosh*, 12 *East*, 311. On proof that goods, which cannot be exported without a license, were entered for exportation at the Custom-house, it will be presumed that there was a license to export them. *Van Omeron v. Dowick*, 2 *Campb*. 43.

Proof of loss by the perils of the seas.] The loss, if traversed, must be proved to have happened as stated in the declaration, and therefore where goods were insured at and from M. to L., and the declaration averred, that after the loading of the goods, the ship departed on her intended voyage, and while in the course of her said voyage, was lost by the perils of the seas, it was held that this was a material allegation, and was not supported by proof that the ship was lost *at her moorings*, and before the cargo was completed. *Abithol v. Bristow*, 2 *Marsh*. 157, 6 *Taunt*. 464, *S. C.*

A loss occasioned by running foul of another vessel by misfortune, is a loss by the perils of the sea; *Buller v. Fisher*, 3 *Esp*. 67; so if she was run down by another ship through gross negligence. *Smith v. Scott*, 4 *Taunt*. 126. So where the vessel is wrecked in consequence of the barratry of the master. *Heyman v. Parish*, 2 *Campb*. 149. So where a portion of the goods was saved from the wreck and got on shore, but never came to the hands of the owners, Gibbs, C. J., held it a total loss by the perils of the seas. *Bondrett v. Hentigg*, *Holt*, 149. So in an insurance on goods, where the ship was stranded on a shoal within a few miles of the port of destination, disabled from proceeding, and lost, but while she lay in the sand was seized by the commander of the place at which she was stranded, and the goods confiscated by him, it was held that the goods were lost by the perils of the seas. *Hahn v. Corbett*, 2 *Bingh*. 205. Where the insurance was on living cattle, warranted free from mortality, which, in the course of the voyage, were killed by the rolling of the ship, it was held a loss by the perils of the seas. *Lawrence v. Aberdein*, 5 *B. and A*. 109; *Gabay v. Lloyd*, 3 *B. and C*. 793. Where a government transport had been insured for twelve months, during which she was ordered into a dry harbour, the bed of which was uneven, and the tide having left her she received damage by taking the ground, it was held to be a loss by the perils of the seas. *Fletcher v. Inglis*, 2 *B. and A*. 315.

But where a ship was hove down upon a beach, within the tide-way, to repair, and the tide rising, she was bilged and damaged, it was held not to be a loss occasioned by the perils

of the seas; *Thompson v. Whitmore*, 3 *Taunt.* 227; *and see Phillips v. Barber*, 5 *B. and A.* 161; nor is the destruction of a vessel by worms, at sea, such a loss; *Rohl v. Parr*, 1 *Esp.* 445; nor where one English ship sinks another, by firing on her, supposing her an enemy. *Cullen v. Butler*, 5 *Mau. and S.* 461.

A loss by perils of the seas, but remotely occasioned by the negligence of the crew, is within the policy. *Walker v. Maitland*, 5 *B. and A.* 171; *and see Bishop v. Pentland*, 7 *B. and C.* 219, *Shore v. Bentall*, 7 *B. and C.* 798 (*n*). So where occasioned by the mistake of the master, provided he were a person of competent skill at the time when the policy was effected. *Phillips v. Headlam*, 2 *B. and Adol.* 380.

Where a ship was disabled by perils of the seas from pursuing her voyage, and the master to defray the expense of repairs, having no other means of drawing money, sold part of the goods insured, and applied the proceeds towards the repairs, it was held that this was not a loss of the goods by perils of the seas. *Sarquy v. Hobson*, 2 *B. and C.* 7, 4 *Bingh.* 131, 1 *Y. and J.* 347, *S. C.* A ship was wrecked, sunk, and sold by the owner and master, after a survey by captains approved by the agent of Lloyd's. Two days after she was got off by the purchaser and repaired, but at great expense. She might, after the repairs, have returned to England in ballast, or with certain kinds of cargo. Lord Tenterden said, that not only must the owner act honestly in the sale, but the underwriters were not liable, unless he formed the best and soundest judgment that could be formed under the circumstances. If the ship could have been brought to England, even in ballast, so as to have repaid the money expended in repairs, they ought to have been made by the captain. The loss of a voyage would not make a constructive total loss of the ship. He left it to the jury to say, whether the captain exercised a sound judgment, as well for the benefit of the underwriters as for himself as owner, and did the best for all parties. *Doyle v. Dallas*, 1 *Moo. and Rob.* 48. Under circumstances very similar to the above, where the ship was sold for 18*l.*, got off by the purchaser in five days, and repaired at an expense of 750*l.*, and was then worth 1200*l.*; Bayley, B., said, "If the situation of the ship be such, that by no means within the master's reach, it can be treated so as to retain the character of a ship, then it is a total loss. If the captain, by means within his reach, can make an experiment to save it, with a fair hope of restoring it to the character of a ship, he cannot, by selling it, turn it into a total loss. If she be in a situation such that, by means which the captain could reasonably use, she could not be brought to retain the character of a ship, it is a total loss. *Bona fides* in the captain will not decide the question, for if he sells erroneously what is intitled to the character of a ship, though he

thinks it a wreck, it will not do." *Gardner v. Salvador*, 1 *Moo. and Rob.* 116. *See also Macburn v. Leckie, Abbott on Shipp.* 6. *Robertson v. Clarke*, 1 *Bingh.* 445.

A ship never heard of is presumed to have foundered at sea. *Green v. Brown*, 2 *Str.* 1199; *Newby v. Read, Park, Ins.* 85, 6*th ed.* In order to recover in such case, the plaintiff must prove that the vessel sailed on the voyage insured. *Cohen v. Hinckley*, 2 *Campb.* 51; *Koster v. Innes, R. and M.* 333. It is sufficient to prove that the ship has not been heard of in this country since the time of her sailing, without calling witnesses from the port of destination, to prove that she never arrived there. *Twemlow v. Oswin*, 2 *Campb.* 85. The time within which a missing ship will be presumed lost, must be regulated by the circumstances of the case. In *Houstman v. Thornton, Holt*, 242, a ship which had sailed on a seven weeks' voyage, and had not been heard of for eight or nine months, was presumed to be lost. Where it was proved that the vessel sailed on the voyage insured, with the goods on board, and never arrived at her port of destination, and that a few days after her departure a report was heard at the place whence she sailed that she had foundered at sea, but that the crew were saved, it was held that this was sufficient *primâ facie* evidence of a loss by the perils of the seas, and that the plaintiff was not bound to call any of the crew, or to show that he was unable to procure their attendance. *Koster v. Reed*, 6 *B. and C.* 19.

Proof of loss by fire.] Proof that the ship was burned to prevent her falling into the hands of the enemy, is evidence of a loss by fire. *Gordon v. Rimmington*, 1 *Campb.* 123. So in an insurance "against fire, barratry, &c." proof that the ship was burned by the negligence of the master and mariners will support a statement of loss by fire. *Busk v. Roy. Exch. Ass.* 2 *B. and A.* 72. But in an insurance on goods, if the goods are burnt in consequence of being put on board in bad condition, it is not a loss by fire within the meaning of the policy. *Boyd v. Dubois*, 3 *Campb.* 133.

Proof of loss by capture.] Where a vessel is driven by a gale of wind on an enemy's coast, and there captured, it is a loss by capture. *Green v. Elmslie, Peake*, 212; *see Hagedorn v. Whitmore*, 1 *Stark.* 157. The books at Lloyd's are evidence of a capture, but not of notice of the loss to the underwriter. *Abel v. Potts*, 3 *Esp.* 242; *ante p.* 138. A foreign sentence of condemnation is not evidence of a capture; but after other proof of a capture, it is evidence to show the grounds of condemnation. *Marshall v. Parker*, 2 *Campb.* 69; *see ante p.* 130. If a ship after capture is restored, so as to be in a condition to pursue the voyage insured, and is afterwards lost on another voyage, the plaintiff cannot recover on a declaration for a loss

by capture. *Kulen Kemp v. Vigne*, 1 *T. R.* 304. Proof of a capture by collusion with the captain, will support an averment of loss, either by capture or barratry. *Per Ld. Ellenborough, Arcangelo v. Thompson*, 2 *Campb.* 621.

Proof of loss by barratry.] Evidence that the person who acted as master of the ship carried her out of her course for fraudulent purposes of his own, is *primâ facie* evidence of barratry, without negative proof that the person so acting as master was not the owner, it lying on the underwriter to prove, in his own discharge, that he was the owner. *Ross v. Hunter*, 4 *T. R.* 33. Where the whole ship is let, the freighter is owner, *pro hâc vice*, and barratry may be committed by the general owner. *Vallejo v. Wheeler, Cowp.* 143. *Soares v. Thornton*, 1 *B. Moore*, 373. Smuggling by the captain, on his own account, will be evidence of barratry; *Lockyer v. Offley*, 1 *T. R.* 252; but if by the gross negligence of the owner, the mariners barratrously carry smuggled goods on board, the underwriters are not liable. *Pipon v. Cope*, 1 *Campb.* 434. Where prisoners of war rise and confine all the crew, and put them on shore, except one, who is heard on the deck in conversation with them, it is evidence of barratry to go to the jury. *Hucks v. Thornton, Holt*, 30.

Proof of stranding.] Where goods are insured free from average, unless general, or the ship should be stranded, before the plaintiff can recover, the *stranding* must be proved. A striking is not sufficient; it is merely temporary, or as it has been vulgarly described, a touch and go; but in order to constitute a stranding, the ship must be stationary. *Per Lord Ellenborough, M'Dougle v. Royal Exch. Ass. Co.* 4 *Campb.* 283, 4 *M. and S.* 503, *S. C.* But where the ship was fixed from fifteen to twenty minutes, it was held a stranding. *Baker v. Towry*, 1 *Stark.* 436. If a ship is forced ashore, or is driven on a bank, and remains for any time on the ground, this is a stranding, without reference to the degree of damage she sustains. *Per Lord Ellenborough, Harman v. Vaux*, 3 *Campb.* 431.

"A stranding," says Mr. Justice Bayley, "may be said to take place where a ship takes the ground, not in the ordinary course of the navigation, but by reason of some unforseen accident." *Bishop v. Pentland*, 7 *B. and C.* 224. Where a ship, under the conduct of a pilot, in her course up the river to Liverpool, was, against the advice of the master, fastened at the pier of the dock basin, by a rope to the shore, and left there, and took the ground, and when the tide left her, fell over on her side and bilged, this was held to be a stranding. *Carruthers v. Sydebotham*, 4 *Mau. and S.* 77. So where, in the course of a voyage upon an inland navigation, it became necessary, in order to repair the navigation, to draw off the water,

and the ship in consequence, having been placed in the most secure situation that could be found, when the water was drawn off, went by accident upon some piles, which were not previously known to be there, it was held a stranding. *Rayner v. Godmond*, 5 *B. and A.* 225. So, where, in the course of the voyage, the ship was by tempestuous weather forced to take shelter in a harbour, and in entering it, struck upon an anchor, and being brought to her moorings was found leaky and in danger of sinking, and on that account was hauled with warps higher up the harbour, where she took the ground and remained fast for half an hour, the stranding was held to be proved. *Barrow v. Bell*, 4 *B. and C.* 736. In the following case also it was held to be a stranding. The ship was compelled in the course of her voyage to put into a tide harbour, and was there moored alongside a quay, in the usual place for ships of her burden. It became necessary, in addition to the usual moorings, to fasten her by tackle to posts on the shore, to prevent her falling over, upon the tide leaving her. The rope, with which she was fastened, not being of sufficient length, broke, when the tide left the vessel, and she fell over upon her side, and was thereby stove in and greatly injured; this was held to be a stranding, though it might have been occasioned remotely by the negligence of the crew. Mr. Justice Bayley said, "So long as the vessel was on the ground, and lashed to the posts on shore, she was not stranded; but, when she fell over on her side, and lay on the ground in that position, she was stranded. The falling over was not in the ordinary course of the voyage, but in consequence of an unforseen accident out of the ordinary course of the voyage, *viz.* the breaking of the rope." *Bishop v. Pentland*, 7 *B. and C.* 219; *and see Wells v. Hopwood*, 3 *B. and Ad.* 21.

But where the taking the ground is in the ordinary course of the navigation, and no more than is usual with vessels on the same voyage, it is not a stranding; thus, where a vessel took the ground in the ordinary course of the navigation, and afterwards being moored at a quay, on the ebb of the tide took the ground, fell over on her side and was injured; but the taking of the ground was stated by a witness to be no more than was usual with vessels of the same class in proceeding up the same navigation, this was held not to be a stranding. *Hearne v. Edmunds*, 1 *B. and B.* 388; *see* 7 *B. and C.* 225. "Where a vessel," says Lord Tenterden, "takes the ground in the ordinary and usual course of navigation and management, in a tide river or harbour, upon the ebbing of the tide or from natural deficiency of water, so that she may float again upon the flow of tide or increase of water, such an event shall not be considered as a stranding within the sense of the memorandum. But where the ground is taken under any extraordinary circumstances of time or place, by reason of some unusual or

accidental occurrence, such an event shall be considered as a *stranding* within the meaning of the memorandum." *Wells v. Hopwood*, 3 *B. and Ad.* 34. And where upon the ebbing of the tide a vessel took the ground, in a tide harbour, in the place where it was intended she should, but in so doing struck against some hard substance by which two holes were made in her bottom, this was held to be no stranding. *Kingsford v. Marshall*, 8 *Bingh.* 458.

In order to bring the case within the *stranding* mentioned in the memorandum as to partial loss, it must appear that the goods were on board at the time; thus where hides grew putrified, and were sold in the course of the voyage at an intermediate port, and the ship was *afterwards* stranded, it was held that this was not a performance of the condition in the memorandum. *Roux v. Salvador*, 1 *Bingh. N. C.* 526.

Proof of amount of loss.] Where the plaintiff declares for a total, he may give evidence of a partial loss. *Gardiner v. Crosedale*, 1 *W. Bl.* 198; *Rucker v. Palsgrave*, 1 *Campb.* 557, 1 *Taunt.* 419. An adjustment is proved by evidence of the signàture of the underwriter, or his agent, with proof of the authority of the latter; and it seems that an agent who has authority to subscribe a policy, has also authority to sign an adjustment of the loss. *Richardson v. Anderson*, 1 *Campb.* 43 (*n*). The production, by the assured, of a policy of insurance with the adjustment on it, and the name of the defendant struck off the policy, is not evidence of the payment to the assured of the sum adjusted. *Adams v. Sanders, M. and M.* 373, 4 *C. and P.* 25, *S. C.* An adjustment is only *primâ facie* evidence against the underwriter, and does not bind him, unless there was a full disclosure of the circumstances of the case; *Shepherd v. Chewter*, 1 *Campb.* 274; and fraud opens an adjustment. *Christian v. Coombe*, 2 *Esp.* 489. An adjustment does not require a stamp. *Wiebe v. Simpson*, 2 *Selw. N. P.* 917, 4*th ed.* In an action on insurance of goods, if the declaration allege the ship to have been sunk, whereby the goods were spoiled, and it appear that some of the goods were saved, the plaintiff may give the expense of salvage in evidence, though not specially averred. *Cary v. King, Rep. temp. Hard.* 304. Salvage on the re-capture of a ship must be proved by producing the proceedings of the admiralty court ascertaining the amount. *Thellusson v. Shedden*, 2 *N. R.* 229. In open policies the assured must prove the extent of his loss; but in valued policies, if the loss be a total one, he is only bound to prove *some* interest in the ship or goods, in order to take the case out of the statute 19 Geo. 2, c. 37, for ever since that statute, the constant usage has been to permit the valuation fixed in the policy to stand, unless the defendant can show that the plaintiff had a colourable interest only, or that he has

greatly overvalued the goods. But where the loss is partial, it opens a valued policy, and the plaintiff is as much bound to prove the value of the goods that have been lost, and to ascertain the damage he has sustained by the loss, as in case of an open policy. 2 *Saund.* 201 (*n*).

The certificate of an agent of Lloyd's resident abroad, is not admissible to prove the amount of damage sustained by goods, though the defendant is a subscriber to Lloyd's. *Drake v. Marryat*, 1 *B. and C.* 473.

Proof of amount of loss—abandonment.] Before the plaintiff can recover for a total loss, it is necessary in some cases to prove an abandonment. "The late cases show that a mere loss of the adventure by retardation of the voyage without loss of the thing insured, either by its being actually taken from the ship or spoiled, does not constitute a total loss, under a policy of insurance, unless by the aid and effect of abandonment." *Per Ld. Tenterden, Naylor v. Taylor*, 9 *B. and C.* 723; *citing Anderson v. Wallis*, 2 *M. and S.* 240, *and Holdsworth v. Wise*, 7 *B. and C.* 794. In order to justify an abandonment, there must have been *that* in the course of the voyage, which, at the time, constituted a total loss. Thus, capture or the necessary desertion of a ship, constitutes a total loss. *Per Bayley, J., Holdsworth v. Wise*, 7 *B. and C.* 799. The effect of an abandonment, therefore, is to prevent a loss at the time total, from becoming, by the operation of subsequent circumstances, partial. It is said by Tindal, C. J., to be a general rule in the law of insurance, that in order to recover for a *constructive* total loss the assured must first abandon, and it makes no difference, that what has been saved has been sold, and the money paid over to the agent of the assured before any notice of the loss. *Roux v. Salvador*, 1 *Bingh. N. C.* 539. Thus, where a cargo of hides, in consequence of a leak, began to putrify, and were sold at an intermediate port for less than a fourth of their value, and it appeared that if they had proceeded they could not have arrived at the end of the voyage *as hides*, it was held to be a constructive total loss, but that notice of abandonment was necessary. *Roux v. Salvador*, 1 *Bingh. N. C.* 526. In this case the authority of *Cambridge v. Anderdon*, 1 *C. and P.* 215, *R. and M.* 61, 2 *B. and C.* 691, *S. C.*, in which it was held, that if a ship was reduced to a mere wreck so as not to be worth repairing, it was unnecessary to prove a notice of abandonment, was doubted by the court.

Where, in a valued policy the risk on the goods was to commence twenty-four hours after her arrival at the coast of Africa (where she was to load), a considerable part of the cargo not being shipped at the time of a total loss, and the part shipped not being equal to the value put upon the goods in the policy, it was held that the valuation was opened, and

that the assured was only entitled to recover a proportion estimated on the part of the cargo shipped at the time of the loss. *Beckman v. Carstairs*, 5 *B. and Ad.* 651, 2 *Nev. and M.* 562, *S. C.* On a policy on freight, the ship having actually carried full freight, though not that intended for her, the assured cannot recover for the delay and expense as a partial loss. *Brocklebank u. Sugrue*, 1 *Moo. and Rob.* 102.

An abandonment may be by parol, but it should be certain, and therefore a statement of the facts, a request to settle for a total loss, and to direct the disposal of the ship, have been held insufficient. *Parmeter v. Todhunter*, 1 *Campb.* 541. The notice of abandonment must be given within a reasonable time. *Read v. Bonham*, 3 *B. and B.* 147; *Hunt v. Royal Exchange Assurance*, 5 *Mau. and S.* 47; *Hudson v. Harrison*, 3 *B. and B.* 106. So the underwriter is bound to say, within a reasonable time after receiving notice of abandonment, whether he will accept it or not. *Hudson v. Harrison*, 3 *B. and B.* 97. A party jointly interested in the subject matter of the insurance, and who has effected the insurance, may give notice of abandonment for all. *Hunt v. the Royal Exchange Assurance*, 5 *Mau. and S.* 47.

Defence.

Under the general issue the defendant cannot, since the new rules, show that the plaintiff is not entitled to recover, on account of fraud, or misrepresentation, or concealment of circumstances, or non-compliance with representations, or non-compliance with a warranty; but such defences must be specially pleaded, the new rules declaring that the plea of non-assumpsit shall operate as a denial only of the subscription to the alleged policy by the defendant, but not of the interest, or the commencement of the risk, of the loss, or of the alleged compliance with warranties. A subsequent rule declares that misrepresentation, deviation, and concealment must be pleaded.

Fraud, misrepresentation, or concealment.] If the assured conceals any material fact which relates to the ship, the policy is void. *Carter v. Boehm*, 3 *Burr.* 1905. And the assured is bound to communicate all the information he has received, though he does not know it to be true, and it afterwards turns out to be false. *Lynch v. Hamilton*, 3 *Taunt.* 37. It is sufficient to communicate *facts*, without the opinion or conclusion founded upon those facts. *Bell v. Bell*, 2 *Campb.* 475; *see Durrell v. Bederley, Holt*, 283. Underwriters may, as it seems, be called to state their opinion, as to whether the communication would have varied the terms of insurance. *Berthon v. Loughman*, 2 *Stark.* 258; *ante p.* 123; *and see* 3 *Stark. Ev.* 1175; *but see Durrell v. Bederley, Holt*, 286, *contra.* But

in an action for negligence in effecting a policy, it has been held that the opinion of underwriters is not evidence upon the question, whether a fact concealed was or was not material to be communicated. *Campbell v. Rickards*, 2 *Nev. and M.* 542. Though in a similar action for not procuring a policy of insurance to be altered, it was held that an insurance-broker might be asked upon inspection of the policy, the invoices, and a letter from the supercargo, stating the circumstances and situation of the ship, what alterations a skilful broker ought to have made. *Chapman v. Walton*, 10 *Bingh.* 57, 3 *Moo. and S.* 389, *S. C.* It is a question for the jury whether any particular fact is or is not material. *Lindenau v. Desborough*, 8 *B. and C.* 586. It is sufficient if a representation be substantially performed, and not like a warranty, strictly and literally. *Pawson v. Watson, Cowper*, 785. And it has been ruled by Lord Tenterden, that the mere fact of a misrepresentation, without fraud, will not be enough to prevent the plaintiff's recovery; for the contract between the parties is the policy which is in writing, and cannot be varied by parol. *Flinn v. Tobin, M. and M.* 367.

In an action against a second or subsequent underwriter, it is the practice to admit evidence of representations to the first underwriter, on a presumption that the subsequent underwriters give credit to such representations. *Marsden v. Reid*, 3 *East*, 573. *Stackpole v. Simon, Park's Ins.* 583, 6*th ed*. The rule is confined to representations made to the *first* underwriter (that is, the first on the policy); *Ibid. Bell v. Carstairs*, 2 *Campb.* 543; and is, it seems, to be taken with great qualifications, both with regard to the time and circumstances under which the communication was made. *Forrester v. Pigou*, 1 *Mau. and S.* 9.

Fraud.] If goods are fraudulently over-valued, with intent to defraud the underwriters, the contract is void, and the assured cannot recover, even for the value actually on board. *Haigh v. De la Cour*, 3 *Campb.* 319.

Deviation.] A deviation from the voyage insured is a defence to an action on the policy. Where the insurance is on a voyage to a given place, and the captain, when he sails, does not mean to go to that place at all, he never sails on the voyage insured. But where the ultimate *termini* of the intended voyage are the same as those described in the policy, although an intermediate voyage be contemplated, the voyage is to be considered the same until the vessel arrives at the dividing point of the two voyages. The departure from the course of the voyage insured then becomes a deviation; but before the arrival at the dividing point there is no more than an intention

to deviate, which, if not carried into effect, will not vitiate the policy. *Per Bayley, J., Hare v. Travis,* 7 *B. and C.* 17. Whether a deviation for the purpose of assisting a vessel in distress is a forfeiture of the policy does not appear to be settled. The Court of Admiralty has expressed a doubt whether it creates a forfeiture, and the American courts have held that it does not. The *Jane*, 2 *Hagg.* 345. 3 *Kent's Commentaries*, 16.

An unreasonable and unjustifiable delay on the part of the insured, before the risk attaches, in commencing the voyage insured against, is in the nature of a deviation, and amounts to such an alteration of the risk as to discharge the underwriters. *Mount v. Larkins*, 8 *Bingh.* 169. Unreasonable delay is properly a question for the jury. *Palmer v. Marshall*, 8 *Bingh.* 318; *see Palmer v. Fenning*, 9 *Bingh.* 460.

Non-compliance with warranties.] The defendant may defeat the plaintiff's claim, by pleading and showing a non-compliance with a warranty, either express or implied; *vide ante p.* 228.

As to the want of proper stamp, and an alteration in the policy, *vide ante p.* 158.

Competency of Witnesses.

An underwriter is a competent witness for another underwriter, who has subscribed the same policy; *Bent v. Baker*, 3 *T. R.* 27; unless he has entered into the consolidation rule, or has paid the loss upon an agreement to be re-paid in case the plaintiff fails. *Forrester v. Pigou*, 1 *Mau. and S.* 14. In an action on insurance of goods, the owner of the vessel is not a competent witness to prove the seaworthiness of the ship, for he would be liable to the plaintiff, if un-seaworthy. *Rotheroe v. Elton, Peake*, 84. So the captain is not a competent witness for the defendant, to disprove the charge of barratry. *Bird v. Thompson*, 1 *Esp.* 339. But in an action on a policy on goods, where the ship was lost by putting into a port out of the line of the voyage, it was held that the captain, who was also part owner, was competent to prove that the ship originally sailed on the voyage insured, by the direction of the owner of the goods, though not to prove that the deviation was justified by necessity. *De Symonds v. De la Cour*, 2 *Bos. and Pul. N. R.* 374; *see also Taylor v. M'Viccar*, 6 *Esp.* 27. One who is jointly interested in the property, whether at the time of effecting the policy; *see De Symonds v. Shedden*, 2 *Bos. and Pul.* 155; or afterwards; *Perchard v. Whitmore, Ibid.* (*n.*); is an incompetent witness for the plaintiff. The captain's protest is not admissible evidence of the facts there stated, but may be read for the purpose of contradicting his testimony. *Senat v. Porter*, 7 *T. R.* 158. *Christian v. Coombe*, 2 *Esp.* 490.

ASSUMPSIT ON WARRANTY OF A HORSE.

When a horse has been sold, and warranted sound, but is in fact unsound, the purchaser may maintain an action upon the warranty, or, in some cases, may rescind the contract, and recover the money paid, under the count for money had and received. Thus, where by the contract the purchaser has the power of returning the horse, should it prove unsound, and does return it, or offers to do so, the contract is at an end, and money had and received will lie. *Towers v. Barrett*, 1 *T. R.* 133. So, where the contract is rescinded with the assent of the defendant. *Per Buller, J., ib.* But the purchaser must return the horse within a reasonable time; *Dr. Compton's case, cited* 1 *T. R.* 136; *and see Adam v. Richards,* 2 *H. Bl.* 574; and he must return him in the state as sold, and not diminished in value by doctoring, &c. *Curtis v. Hannay*, 3 *Esp.* 82. *See* 5 *East*, 452. Where a horse was warranted sound, and the vendor said, in a subsequent conversation, that if the horse were unsound he would take it again and return the money, it was held that the original contract was not abandoned, and that assumpsit for money had and received could not be maintained by the purchaser, the horse not being taken back. *Payne v. Whale*, 7 *East*, 274. It is only where there is a condition in the contract authorising the return, or the vendor has received back the horse and has thereby consented to rescind the contract, or has been guilty of a fraud which destroys the contract altogether, that the purchaser may insist, in an action for the price, that the contract is rescinded. *See Street v. Blay*, 2 *B. and Adol.* 462; *Gompertz v. Denton*, 1 *C and M.* 207. If the plaintiff sues for money had and received he must prove the purchase, and warranty, and power to rescind (and, for this purpose, show a breach of the warranty, if necessary), and also the rescinding of the contract by returning the horse.

Where the plaintiff proceeds on the contract of warranty, he must prove, 1, The contract, *viz.* the consideration and the promise; 2, The breach of the warranty; and, 3, The damage sustained, or such of those facts as are denied upon the record. *Vide post p.* 243. Where there was a warranty, it was held that though the plaintiff discovered the unsoundness shortly after the purchase and gave no notice of it, but kept the horse nine months and endeavoured by medicines to cure it, he was still intitled to recover. *Pallershall v. Tranter*, 4 *Nev. and M.* 649.

The consideration.] This is usually proved by the production of the receipt. If the defendant took another horse in part payment, it is no variance to state that the whole price was paid in money. *Hands v. Burton*, 9 *East*, 349. *Brown v.*

Fry, *Selw. N. P.* 630; *but see Harris v. Fowle, cited* 1 *H. Bl.* 287. If an agent sell to A. two horses belonging to B. and C. and warrant them, A. must not declare as upon the sale of one horse, the contract being entire. *Symonds v. Carr*, 1 *Campb.* 361. Where the declaration stated the contract to be, that in consideration the plaintiff would buy of the defendant a horse for a certain price, to wit 55*l.*, the defendant undertook that the horse was sound; and the contract proved was that the defendant warranted the horse sound, and agreed to give 1*l.* back if the horse did not bring the plaintiff 4*l.* or 5*l.*, this was held a fatal variance. *Blyth v. Bampton*, 3 *Bingh.* 472, *Gaselee, J., diss.*

The promise or warranty.] The plaintiff must prove an express warranty, a high price not being tantamount thereto. *Parkinson v. Lee*, 2 *East*, 322. Where the plaintiff wrote to the defendant, "You will remember that you warranted a horse as a five-year old, &c." to which the defendant answered, "The horse is as I represented it," it was ruled that this was sufficient evidence for the jury to infer a warranty at the time of sale. *Salmon v. Ward*, 2 *C. and P.* 211. If the seller says, "The horse is sound to the best of my knowledge, but I will not warrant it," and the seller knows it to be unsound, he is answerable on this qualified warranty. *Wood v. Smith*, 4 *C. and P.* 45, *M. and M.* 539, *S.C.* Where the warranty was, "To be sold, a black gelding, five years old—has been constantly driven in the plough—warranted," this was held to be only a warranty of soundness. *Richardson v. Brown*, 1 *Bingh.* 344, 8 *B. Moore*, 336, *S. C.* So, "received of B. 10*l.* for a grey four-year old colt, warranted sound," is not a warranty of age. *Budd v. Fairmaner*, 8 *Bingh.* 48. Where there is a manifest defect to which the attention of the parties is called at the time of the bargain, a general warranty of soundness will not be deemed to extend to it. *Margetson v. Wright*, 7 *Bingh.* 603. A *splint* has been held not to be such a manifest defect. *Margetson v. Wright* (*new trial*), 8 *Bingh.* 454. Where a horse is sold by private sale, at a repository for the sale of horses, where upon a board fixed up in a conspicuous situation the terms of the sale of horses are painted, a purchaser there must be taken to be cognizant of those terms, though nothing is said respecting them at the time of sale. If one of the terms is, that the horse being found to be unsound must be returned within twenty-four hours, it must be complied with, though the unsoundness is of such a nature as may probably not be discovered within that time. *Bywater v. Richardson*, 1 *Ad. and Ell.* 508, 3 *Nev. and M.* 748, *S. C.*

A servant, employed to sell a horse, has an implied authority to warrant; *Alexander v. Gibson*, 2 *Campb.* 555; and even though the servant have express directions not to warrant, but

does warrant, the master, it is said, is bound, because the servant, having a general authority to sell, is in a condition to warrant, and the master has not notified to the world that the general authority is circumscribed. *Per Bayley, J., Pickering v. Busk*, 15 *East*, 45; *see Helyear v. Hawke*, 5 *Esp.* 75. But this doctrine has according to certain authorities been confined to the cases of sales by servants of horse-dealers, who may be supposed to possess a general authority. *Bank of Scotland v. Watson*, 1 *Dow*, 45; *and see Fenn v. Harrison*, 3 *T. R.* 760, *Anon. case, cited* 15 *East*, 407. What is said by the servant at the time of sale is evidence, but an acknowledgment at another time is not so, and the servant must be called. *Helyear v. Hawke*, 5 *Esp.* 72. Thus, where the horse had been already sold, and the vendor's servant on delivering him to the purchaser, made certain statements and signed a receipt for the price, containing a warranty, it was held that the vendor was not bound by such statements or receipts, no express authority to give the warranty being shown. *Woodin v. Burford*, 2 *Crom. and M.* 391, 4 *Tyr.* 64, *S. C.* A receipt for the price, containing the warranty, is admissible to prove the latter, though only bearing a receipt stamp. *Skrine v. Elmore*, 2 *Campb.* 407. A receipt containing a warranty given after the bargain is not *conclusive* evidence of the contract. *Fairmaner v. Budd*, 7 *Bingh.* 574.

Where the plaintiff declared on a warranty that the horse was sound, and the warranty proved was, that the horse was sound everywhere, except a kick on the leg, it was held a fatal variance. *Jones v. Cowley*, 4 *B. and C.* 445. When the consideration was stated to be 63*l.*, but the evidence was that the plaintiff would pay that sum, "and if the horse was lucky would give the defendant 5*l.*, or the buying of another horse," this was held to be no variance, the latter words being too vague to amount to a promise in law. *Guthing v. Lynn*, 2 *B. and Adol.* 232.

Breach of the warranty.] By rule H. T., 4 W. 4, the plea of *non assumpsit* only operates as a denial of the fact of the warranty having been given upon the alleged consideration, but not of the breach. If the breach be denied, the plaintiff must give positive proof that the horse was unsound, &c. at the time of the sale; a suspicion that the horse was unsound is not sufficient, *Eaves v. Dixon*, 2 *Taunt.* 343. It was ruled by Lord Ellenborough, that any infirmity, as a temporary lameness, which renders a horse less fit for present use or convenience, though not of a permanent nature, and though removed after action brought, was an unsoundness. *Elton v. Brogden*, 4 *Campb.* 281, 1 *Stark.* 127, *S. C.* But in *Garment v. Barrs*, 2 *Esp.* 673, it was ruled by Eyre, C. J., that a horse labouring under a temporary injury or hurt, which is capable of being speedily cured or re-

moved, is not an unsound horse. *Roaring* is not, it is said, necessarily unsoundness, unless symptomatic of disease; *Basset v. Collis*, 2 *Campb*. 523; but if it is of such a nature as to incommode the horse when pressed to his speed, it is an unsoundness. *Onslow v. Eames*, 2 *Stark*. 81. Mere badness (such as may produce cutting), though it may render the horse incapable of work, is not unsoundness. *Dickinson v. Follett*, 1 *Moo. and Rob*. 299. A nerved horse is unsound. *Best v. Osborne*, *R. and M*. 290. A cough, if of a permanent nature, is an unsoundness; *Shillitoe v. Claridge*, 2 *Chitty's R*. 425; *see* 1 *Stark*. 127; but crib-biting is not unsoundness. *Broennenburg v. Haycock*, *Holt*, 630. Whether *thrushes, splints, or quidding*, be an unsoundness, is a disputed question; 2 *Campb*. 524 (*n*); but a *splint* which afterwards produces lameness, is an unsoundness before the lameness produced. *Margetson v. Wright*, 8 *Bingh*. 454. So the being "chest foundered." *Atterbury v. Fairmanner*, 8 *B. Moore*, 32. It need not be averred, nor, if averred, proved, that the defendant knew of the unsoundness. *Williamson v. Allison*, 2 *East*, 446. Proof that a horse is a good drawer will not satisfy a warranty that he is "a good drawer, and pulls quietly in harness." *Bolthird v. Puncheon*, 2 *D. and R*. 10.

Damages.] If the horse has been returned, the plaintiff will be intitled to recover the whole price; if kept, the difference between the value and the price; or the plaintiff may sell the horse for what he can get, and recover the residue of the price in damages. *Caswell v. Coare*, 1 *Taunt*. 566. If the horse is not tendered to the vendor, the vendee can recover no damages for the expense of his keep; *ibid.*; but where the seller rescinded the contract, it was held that he was liable for the keep of the horse from the time of the contract; *King v. Price*, 2 *Chitty*, 416; though for such a space of time only as would be required to re-sell the horse to the best advantage. *M'Kenzie v. Hancock*, *R. and M*. 436. Where, after notice to the vendor, that the horse might be taken away, he was re-sold, the vendor was held liable for the keep, for a reasonable time, which was ruled to be a question for the jury. *Chesterman v. Lamb*, 4 *Nev. and M*. 195. Where A. warranted a horse to B., who re-sold him with a warranty to C., and the horse proving unsound, C. sued B., who gave notice to A. of the action, and offered him the option of defending it, but A. not giving any answer, B. defended the action, and failed, it was held that A. was liable, in an action on the warranty, for the costs of the action brought by C. against B. *Lewis v. Peake*, 7 *Taunt*. 153, 2 *Marsh*. 431, *S. C.*

Competency of witness.] It has been held, that a former proprietor of a horse, who has sold him with a warranty to the

plaintiff, is a competent witness for the defendant, to prove that the horse was, at the time of the sale by himself, sound; for it does not appear that the horse was unsound at that time, and unless it were, the witness would not be liable to the defendant; *Briggs v. Crick*, 5 *Esp.* 99; and similar evidence was admitted by Lord Tenterden. *Baldwin v. Dixon*, 1 *Moo. and Rob.* 59; *but see* 2 *Phill. Ev.* 114, 3 *Stark. Ev.* 1647 (*n*), *and Lewis v. Peake, supra.* But in a later case, Alderson, J., held the witness incompetent, saying that the effect of the verdict would be to relieve the witness from an action at the suit of the defendant. *Biss v. Mountain*, 1 *Moo. and Rob.* 302; *and see the note of the reporter. Id.* 303.

ASSUMPSIT ON PROMISE OF MARRIAGE.

To maintain this action, the plaintiff must prove, 1, the promise of the defendant as stated, and, 2, the breach if traversed. The promises must be mutual, the reciprocity constituting the consideration. 1 *Rol. Ab.* 1, 5, 22. Either a man or woman may sue for breach of promise of marriage, although an attempt was made in *Harrison v. Cage*, 5 *Mod.* 511, to resist the action on the ground that marriage is not an advancement for a man. As in other cases, an infant may enforce an advantageous contract, although not bound thereby, so an infant may sue a person of full age for breach of promise of marriage. *Holt v. Ward*, 2 *Strange*, 937. *Warwick v. Bruce*, 2 *Mau. and S.* 209. This action falls within the general rule *actio personalis moritur cum personâ*; and cannot be maintained by an executor or administrator, unless perhaps under peculiar circumstances, whereby a strict pecuniary loss has accrued to the party deceased, and the personal estate been endamaged accordingly, which special damage must be stated on the record, for it will not be intended. *Chamberlain v. Williamson*, 2 *Mau. and S.* 416.

Proof of the contract.] In an early case (*Philpot v. Walcot, Skin.* 24, 3 *Lev.* 65, *S. C.*) it was held that mutual promises to marry come within the fourth section of the statute of frauds; and the rule was so stated by Lord Chief Baron Comyn in the Digest (*Action on the case, F.* 3;) but in *Bull. N. P.* 210, a contrary doctrine is laid down, for which the authority of *Cork v. Baker*, 1 *Strange*, 34, is cited. This case, as well as that of *Harrison v. Cage*, 1 *Ld. Raymond*, 386, has been animadverted upon by Mr. Phillipps, in vol. 2, of his Evidence, page 73, 5th edition. He, however, concludes by stating the better opinion to be, and it is universally agreed upon at this day, that the promises need not be in writing. Should,

however, written evidence of the contract be produced, no stamp is required. *Orford v. Cole*, 2 *Stark.* 351. A promise on the part of a woman may be presumed from such circumstances of acquiescence, or tokens of approval, as ordinarily attend the acceptance of an offer of marriage; her presence when the offer was made, and the consent of parents asked, without her making any objection; her subsequent reception of the suitor's visits, and concurrence in the arrangements for the wedding; her carrying herself as one consenting and approving, for her express consent in words is not necessary. *Daniel v. Bowles*, 2 *C. and P.* 554. *Hutton v. Mansell*, 3 *Salk.* 16. But to prove a promise by a man, undoubtedly more would be necessary, neither the usages of society nor considerations of delicacy interfering, to restrain an explicit declaration on his part. A promise to marry generally is in law a promise to marry within a reasonable time; and although a special promise to marry at a particular time, varying from that stated on the record, should be proved in evidence, it may be left to a jury to infer from the circumstances a promise to marry generally. *Potter v. Deboos*, 1 *Stark.* 83. *Phillips v. Crutchley*, 3 *C. and P.* 178, 1 *Moore and P.* 239.

The breach of the promise.] To prove the breach of the promise, evidence must be given either that the defendant has married another, so that the performance of the promise is no longer possible; or that a tender has been made by the plaintiff, followed by a refusal on the part of the defendant. For this purpose it has been held sufficient, that the father of a female plaintiff demanded of the defendant, if he meant to perform his engagement with his daughter, and that the defendant replied, "Certainly not." *Gough v. Farr*, 2 *C. and P.* 631. Any conduct or circumstances evincing the readiness of the one party, and the contrary determination of the other, would be evidence of a tender and refusal to lay before a jury.

Defence.

If, after entering into a contract of marriage, either party discover gross immorality, or depraved conduct in the other, evidence to that effect may be given in bar of the action; thus brutal and violent conduct in the man, accompanied with threats of ill usage to the woman, go to the ground of the action; *Leeds v. Cook*, 4 *Esp.* 258; and if a man has been paying his addresses to one that he supposes a modest person, and he afterwards discovers her to be with child, (not by himself,) or to be a loose and immodest woman, and on such account he refuses to fulfil any promise of marriage he may have made her, he is justified in so doing. *Irving v. Greenwood*, 1 *C. and P.* 350. *Baddeley v. Mortelock*, *Holt*, 151. But if a man

knowingly promise to marry a loose and immodest woman, he is bound by such promise. *Per Lord Tenterden, ibid.* To entitle the defendant to a verdict, on the ground of the bad character of the plaintiff, it is not sufficient to show that charges (as of pecuniary dishonesty and perjury) were made against him, which he promised, but failed to explain. The defendant must go further, in order to bar the action, and show that the charges were founded, and that the plaintiff's character was bad. *Baddeley v. Mortlock, Holt*, 151. In reduction of damages, any circumstances in the character of the plaintiff, leading the jury to a just appreciation of the loss for which compensation is sought, may be proved; as also the disapprobation of the match expressed by the parents of the defendant, to prove which (the father being an incompetent witness by reason of his having employed the attorney) Lord Tenterden allowed one of the other relations to be called. *Irving v. Greenwood*, 1 *C. and P.* 350. To show the general bad character of the plaintiff, a witness may state what has been said by third persons; and it is not necessary to produce those persons. *Faulkes v. Sellway*, 3 *Esp.* 236, *supra*. If by misrepresentation, or wilful suppression of the real circumstances of the family and previous life of the plaintiff, the defendant be induced to enter upon or continue the treaty of marriage, it is a good defence to the action. *Wharton v. Lewis*, 1 *C. and P.* 531. Should the defendant's counsel intimate by his course of cross-examination of the plaintiff's witnesses, that the practice of deception is imputed to the plaintiff, the plaintiff's counsel ought, upon such notice, before closing his case, to offer the evidence rebutting such imputation. *Ibid.* If a female plaintiff know that her father is making, by letter, representations to the defendant respecting her, his letters are evidence for the defendant, to show deceit on her part, although she will not be answerable for particular expressions; but a representation made orally by the father to a third person, in the absence of the plaintiff, and by such person communicated to the defendant, is not admissible. *Foote v. Hayne*, 1 *C. and P.* 547.

ASSUMPSIT ON AN AWARD.

In assumpsit on an award, the plaintiff must prove the submission and award in the manner before stated; *ante p.* 96; and the performance by himself of any conditions precedent. Where the submission has been by a judge's order, which has been made a rule of court, it is sufficiently proved by production of the rule. *Still v. Halford*, 4 *Campb.* 17. If the time for making the award has been enlarged, and the award made

within the enlarged time, the plaintiff must show that the enlargement was duly made, according to the terms of the submission or by the consent of the parties. But if the enlargement was irregularly made, such irregularity is waived by the appearance of the parties before the arbitrator after the enlargement. *Re Hick*, 8 *Taunt.* 694. *Halden v. Glasscock*, 8 *Dow. and Ry.* 151. *Lawrence v. Hodgson*, 1 *Y. and J.* 16. The plaintiff need not prove that the defendant had notice of the award, for he is bound to take notice of the award, as well as the plaintiff. 2 *Saund.* 62 *a* (*n*).

Defence.

The defendant, under the general issue, may object that there is a variance between the award declared on, and that produced in evidence. But corruption or misconduct of the arbitrators is not matter of defence, at least where, for such corruption or misconduct, application might have been made to the court to set such award aside. *Wills v. Maccarmick*, 2 *Wils.* 148. *Braddick v. Thompson*, 8 *East*, 344. *Watson on Awards*, 224; *and see Brazier v. Bryant*, 3 *Bingh.* 167. Nor, as it seems, can the award be impeached on the ground that the decision of the arbitrator has proceeded on a mistake. *See Johnson v. Durant*, 2 *B. and Ad.* 931. *Ashton v. Poynter*, 1 *Crom. M. and R.* 738.

ASSUMPSIT ON AN ATTORNEY'S BILL.

In an action upon an attorney's bill, the plaintiff must prove, 1, Under the general issue, if pleaded, his retainer by the defendant, which may be proved by showing that the defendant attended at his office, and gave directions; 2, That the business was done, (if that fact be denied by the pleadings,) which may be proved by a clerk, or other agent, who can speak to the existence of the causes and the business in respect of which the charges are made, and can prove the main items; *Anon.* 1 *Esp. D. N. P.* 10; without proving the several items to have been done. *Phillips v. Rodch*, 1 *Esp. D. N. P.* 10. If there are no taxable items in the bill, it will also be necessary to give general evidence of the reasonableness of the charges. Proof of a judge's order, referring the bill to be taxed, and of the defendant's undertaking to pay what shall appear to be due, and of the master's *allocatur*, will be sufficient proof, both of the retainer and of the business having been done. *Lee v. Jones*, 2 *Campb.* 496. 3, Where the demand is for fees, charges, or disbursements, at law or in equity, he cannot recover until the expiration of one month (a lunar month, *Hurd v. Leach*, 5 *Esp.* 168) or more, after he has delivered

to the party or parties to be charged therewith, or left for him or them, at his or their dwelling-house, or last place of abode, a bill of such fees, charges, and disbursements, subscribed with the proper hand of such attorney or solicitor; 2 G. 2, c. 23. s. 23; and he must, therefore, where the non-delivery is pleaded, prove the delivery of such bill. Intelligible abbreviations will not vitiate the bill. *Reynolds v. Caswell*, 4 *Taunt.* 193. *Frowd v. Stillard*, 4 *C. and P.* 512. In an action by two attorneys, partners, a bill signed in the name of the firm is sufficient. *Smith v. Jago*, 1 *C. and J.* 542, 5 *C. and P.* 94, *S. C.*

Costs, charges, and disbursements.] Where the demand is partly for taxable items, and partly for items not taxable, it has been held that the plaintiff may recover for charges or disbursements not taxable, provided he has delivered no bill at all, but where he has delivered a bill irregularly he cannot; and, therefore, where a single item for business done in court is inserted in the bill, it must be proved to have been signed and delivered according to the statute. *Winter v. Payne*, 6 *T. R.* 645. *Mowbray v. Fleming*, 11 *East*, 285. *Tidd*, 329, 8*th ed.* *Weld v. Crawford*, 2 *Stark.* 538. And where the plaintiff had been employed in defending a cause, and had done other business not taxable, and had delivered separate bills, Lord Tenterden ruled, that all ought to have been included in one bill, and that the second bill ought to have been delivered a month before the action. *Thwaites v. Mackerson*, *M. and M.* 199. But it seems that where a bill is delivered according to the statute, containing various taxable items, one item of which is not sufficiently described, according to the provisions of the statute, the plaintiff may still recover the residue of the bill. *Drew v. Clifford*, *R. and M.* 280.

Taxable items have been held to be, preparing a warrant of attorney; *Sandom v. Bourn*, 4 *Campb.* 68; *but see Burton v. Chatterton*, 3 *B. and A.* 488; *see also Wilson v. Gutteridge*, 3 *B. and C.* 157; *Weld v. Crawford*, 2 *Stark.* 538; a *dedimus potestatem; ex parte Prickett*, 1 *N. R.* 266; preparing an affidavit to hold to bail. *Winter v. Payne*, 6 *T. R.* 645. So items for attending and examining bail, and attending the plaintiff in several actions against the defendant, and arranging to take cognovits therein, are taxable items. *Watt v. Collins*, *R. and M.* 284. So attending and advising a party who has been served with a writ. *Smith v. Taylor*, 7 *Bingh.* 259. So the obtaining a bankrupt's certificate. *Collins v. Nicholson*, 2 *Taunt.* 321; *see Ford v. Webb*, 3 *B. and B.* 241. So attending at a lock-up-house and obtaining the defendant's release and filling up the bail bond. *Fearne v. Wilson*, 6 *B. and C.* 87. And so also attesting a replevin bond. *Wardle v. Nicholson*, 4 *B. and Ad.* 469, 1 *N. and M.* 356, *S. C.* So

where the attorney proceeds only for costs out of pocket. *Miller v. Towers, Peake*, 102. But a bill for conveyancing alone is not taxable; *Anon. Tidd*, 329; nor is preparing an affidavit of a petitioning creditor's debt and bond to the chancellor, for a commission of bankrupt, a taxable item, the affidavit having never been sworn, nor the commission issued; *Burton v. Chatterton*, 3 *B. and A.* 486; nor searching at the judgment office; *Fenton v. Correa*, 2 *C. and P.* 45, *R. and M.* 262, *S. C.*; and money paid by an attorney, in consequence of his undertaking to pay debt and costs, is not a disbursement within the statute. *Protheroe v. Thomas*, 6 *Taunt.* 196. Where a bill contains taxable articles and a separate demand for money lent, on a distinct occasion, the latter may be recovered, though the bill was not regularly signed. *Hemming v. Wilton, M. and M.* 529; *Hill v. Humphreys*, 2 *Bos. and Pul.* 343; *Benton v. Garcia*, 3 *Esp.* 149. But where a bill containing taxable items, and also an item for 3*l.*, for money lent by the plaintiff to the defendant, for the purpose of paying costs, had not been properly delivered, it was held that the 3*l.* could not be recovered. *Smith v. Taylor*, 7 *Bingh.* 259. A distinction seems to be taken in these cases between items which have no reference to the plaintiff's professional character, and items which, though not *taxable*, have such reference; and in the former case it seems that he may recover though a bill may have been irregularly delivered. *See also Miller v. Towers, Peake*, 102. And it has been held that where an attorney not having delivered any bill to his client before action brought, but particulars of demand containing some taxable items after action brought, cannot recover for an item not taxable, if such item be in respect of business done or money paid to his client's use in his character of attorney. *Wardle v. Nicholson*, 4 *B. and Ad.* 469. 1 *N. and M.* 356, *S. C.*

A bill must be delivered, under the statute, for business done, at the quarter sessions; *Clarke v. Donovan*, 5 *T. R.* 694; *Sylvester v. Webster*, 9 *Bingh.* 388; or the insolvent court. *Smith v. Wattleworth*, 4 *B. and C.* 364; or in the county court. *Wardle v. Nicholson*, 4 *B. and Ad.* 469, 1 *N. and M.* 356, *S. C.* So a bill for business done in a criminal suit in the court of Great Sessions of Caermarthen, was taxable. *Lloyd v. Maund, Tidd*, 330; *but see* 2 *Meriv.* 500. But business done in the House of Lords on the prosecution of an appeal is not taxable. *Williams v. Odell*, 4 *Price*, 279. It has lately been held that a signed bill need not be delivered by an attorney suing for business done in the Middlesex Court of Requests; *Becke v. Wells*, 1 *C. and M.* 75; nor for business done under a commission of bankruptcy. *Hamilton v Jones*, 4 *M. and P.* 869. *Crowder v. Davies*, 3 *Y. and J.* 433.

An agreement entered into by a client with his attorney, to pay him at a certain specified rate for business to be done, is

not binding, or at all events is not conclusive, upon the client. *Drax v. Scroope*, 2 *B. and Ad.* 581.

Though an attorney of one court may, with the consent and in the name of an attorney of another court, practise, in the latter court, yet if he practises there in his own name he cannot recover for his fees. *Latham v. Hyde*, 1 *C. and M.* 128, 3 *Tyr.* 143, *S. C.* *See Hockley v. Bantock*, 2 *Myl. and K.*, 437, *and post* 254. So in an action by several partners, attornies, for business done in the Palace Court, it appearing that only one of the plaintiffs was an attorney of that court, it was held that they could not recover. *Arden v. Tucker*, 1 *Moo. and Rob.* 191, 5 *C. and P.* 258, *S. C.*

An attorney's bill cannot be recovered on an *account stated*, though the amount has been admitted, without proof of the delivery of a bill. *Eicke v. Nokes*, 1 *Moo. and Rob.* 359.

Delivery of the bill.] The bill should not only be delivered, but *left* with the defendant. *Brooks v. Mason*, 1 *H. Bl.* 290. Showing and explaining the bill, without a regular delivery, is not sufficient. *Crowder v. Shee*, 1 *Campb.* 437. It is not sufficient to prove that the bill was delivered at a particular place, (not shown to be the defendant's abode), and that the defendant afterwards delivered it to his attorney's clerk. *Eicke v. Nokes*, *M. and M.* 305. An indorsement on the bill, in the handwriting of the plaintiff's clerk, since dead, proved to have existed at the time of the date, and stating that a copy was on such a day delivered to the defendant, together with proof that it was the clerk's duty to deliver the bill, and that such an indorsement was usually made in the course of business, will be sufficient *primâ facie* evidence of the due delivery. *Champneys v. Peck*, 1 *Stark.* 404.

To whom.] A personal service is not necessary, but a delivery to an agent appointed by the party to receive it, will be sufficient. *Per Lord Ellenborough*, *Finchett v. How*, 2 *Campb.* 277. Thus the delivery of the bill to the attorney of the party is good. *Warren v. Cunningham*, *Gow*, 71; *Vincent v. Slaymaker*, 12 *East*, 372, *diss. Ld. Ellenb.* So a delivery to one of several persons who has been authorised to act for the others, is a delivery to all; *Finchett v. How*, 2 *Campb.* 277; and seems sufficient in an action against any one of them. *Crowder v. Shee*, 1 *Campb.* 437. Thus, where an attorney had been retained jointly by several parties to defend several suits against each, in the subject matter of which they had a common interest, it was held that the delivery of a bill to one, was sufficient to enable the plaintiff to maintain a joint action against all. *Oxenham v. Lemon*, 2 *D. and R.* 461. As to the joint retainer, *see Hellings v. Gregory*, 1 *C. and P.* 627.

At what time.] The bill must be proved to have been delivered one (lunar) month before the commencement of the action. The Nisi Prius record was formerly sufficient *primâ facie* evidence, when made up of a term commencing more than one month after the delivery or the bill, that the action had not been brought too soon, and made it incumbent on the defendant, if the fact was so, to prove that the action was commenced too soon by producing a copy of the writ; *Webb v. Pritchett*, 1 *B. and P.* 263; *Rhodes v. Gibbs*, 5 *Esp.* 163; or the declaration. *Harris v. Orme*, 2 *Campb.* 497 (*n*). But now, by the Uniformity of Process Act, 2 W. 4, c. 39. s. 11, the issuing of the writ of summons is for all purposes the commencement of the suit. *Alston v. Underhill*, 1 *Crom. and M.* 492. The time of the issuing of the writ may be proved by the parol evidence of the plaintiff's attorney, without producing the writ or a copy. *Lester v. Jenkins*, 8 *B. and C.* 339, 2 *M. and R.* 429, *S. C.*

At what place.] Leaving the bill at the defendant's counting-house is not sufficient. *Hill v. Humphreys*, 2 *B. and P.* 343. It seems that it is sufficient to leave it at his last *known* place of abode. It is not sufficient for the defendant to show that he had left that place of abode, without also showing that he had a latter known place of abode. *Wadeson v. Smith*, 1 *Stark.* 324.

Proof of the bill.] The bill may be proved by a copy or duplicate original, without any notice to produce the bill delivered. *Anderson v. May*, 2 *B. and P.* 237. *Colling v. Trewick*, 6 *B. and C.* 394; *Fyson v. Kemp*, 6 *C. and P.* 72; *see Phillipson v. Chase*, 2 *Campb.* 110. A mistake in the date of the items, which does not mislead, will not vitiate the delivery of the bill. *Williams v. Barber*, 4 *Taunt.* 806.

Cases in which a bill need not be delivered.] A bill signed according to the statute, need not be delivered, though containing taxable items, when it is due from one attorney or solicitor to another attorney or solicitor; 12 Geo. 2, c. 13, s. 6; though the defendant only became an attorney after the business was done; *Ford v. Maxwell*, 2 *H. Bl.* 589; *Wildbore v. Bryan*, 8 *Price*, 677; and such a bill is not within the statute 3 Jac. 1, c. 7, s. 1. *Sandys v. Hornby*, 1 *Moo. and Rob.* 33. Nor need the executor or administrator of an attorney deliver a bill. 1 *Barnard. K. B.* 433. *Barrett v. Moss*, 1 *Carr. and P.* 2. To *set-off* the bill, it need not have been delivered a month; it is sufficient to deliver it in time for the plaintiff to have it taxed before the trial; *Martin v. Winder*, *Dougl.* 199 (*n*); *Tidd*, 335; *but see Murphy v. Cunningham*, 1 *Anstr.* 198, *contra*; *and Bulman v. Burkett*, 1 *Esp.* 449,

where it is said by Lord Kenyon, that when an attorney means to avail himself of his bill for business done, and to give it in evidence, he must deliver a bill signed to the plaintiff, but that it is not necessary that a month's time should intervene between the delivery and the action.

Defence.

Where a bill has been delivered containing taxable items, the defendant cannot object to the reasonableness of the charges at the trial. *Anderson v. May*, 2 *B. and P.* 237. *Tidd*, 345. *Lee v. Wilson*, 2 *Chitty's R.* 65. The delivery of a former bill is conclusive evidence against an increase of charge on any of the same items contained in a subsequent bill, and strong presumptive evidence against any additional items; but real errors or omissions are to be allowed for. *Loveridge v. Botham*, 1 *B. and P.* 49. The plaintiff's negligence in the conduct of the business, cannot be set up as a defence; *Templer v. M'Lachlan*, 2 *N. R.* 136; *Pasmore v. Birnie*, 2 *Stark.* 59; unless it has been such as to deprive the defendant of all benefit, and the charges sought to be recovered have been occasioned by the plaintiff's want of proper caution; *Montriou v. Jefferys*, *R. and M.* 317, 2 *C. and P.* 113, *S. C.*; but if there are other causes conducing to the loss of the benefit, besides the plaintiff's negligence, the negligence is no defence to the action. *Dax v. Ward*, 1 *Stark.* 409. If an attorney, through inadvertence or inexperience, incurs trouble which is useless to his client, he cannot recover a remuneration for such trouble. *Hill v. Featherstonhaugh*, 7 *Bingh.* 569. And entire items for useless work may be discarded by the jury. *Shaw v. Arden*, 9 *Bingh.* 288. It is no defence in an action for business done in defending a suit, that the plaintiff was instructed to put in a plea in abatement, for delay, which he neglected to do, whereby the defendant had judgment against him. *Johnson v. Alston*, 1 *Campb.* 176. Where an attorney prepares a document, which is illegal, but with regard to the legality of which there was a reasonable doubt, he is entitled to recover for the preparing it. *Potts v. Sparrow*, 6 *C. and P.* 749.

It is a good defence that the plaintiff resides at a considerable distance from the place where his business is carried on, and that in fact the business is transacted there by his articled clerk. *Taylor v. Glassbrook*, 3 *Stark.* 75. *Hopkinson v. Smith*, 1 *Bingh.* 13. So it is a good defence that the plaintiff undertook the cause *gratis*; and the declarations of his clerk, when he attended to tax the costs in the cause, are evidence for the defendant. *Ashford v. Price*, 3 *Stark.* 185, 1 *D. and R. N. P. C.* 48, *S. C.*

The defendant may prove that the plaintiff has neglected to take out his certificate, by which his admission has become

void. 37 Geo. 2, c. 90, s. 31. But where, in an action brought by an attorney, in 1825, the defendant proved that the plaintiff had not taken out any certificate during the years 1814, 1815, 1818, 1819, and 1820, but did not prove that the plaintiff had not been readmitted after that time, and there was evidence that in 1824 the plaintiff had acted as an attorney, and been retained by the defendant in that character, it was held that this *primâ facie* evidence was unrebutted by the defendant, and that the plaintiff was entitled to recover. *Pearce v. Whale*, 5 *B. and C.* 38. And an attorney may maintain an action for business done at a time when he was uncertificated, provided a certificate be taken out by him before the end of a year after the expiration of the period to which the prior certificate extended. *Bowler v. Brown*, 4 *Nev. and M.* 17. It is no defence in an action for fees due for the suing out a commission of bankruptcy, that the plaintiff is only an attorney of K. B. and not a solicitor in chancery. *Wilkinson v. Diggell*, 1 *B. and C.* 158. *Vide ante* 251. And it is no defence that the plaintiff refused to go on with a suit in chancery, if the defendant did not supply him with money. *Rowson v. Earle*, *M. and M.* 538. For though an attorney cannot suddenly and without notice abandon a cause, yet if he give reasonable notice, he is at liberty to discontinue the conduct of it, on his client refusing to supply him with money, *Vansandau v. Browne*, 9 *Bingh.* 402.

Where one attorney does business for another, the attorney who does the business universally gives credit to the attorney who employs him, and not to the client for whose benefit it is done. If the attorney in such case intends not to be personally responsible, it becomes his duty to give express notice, that the business is to be done on the credit of the client. It furnishes no defence that the business was known by the plaintiff to be done for the benefit of the client. *Scrace v. Whittington*, 2 *B. and C*, 11.

ASSUMPSIT ON APOTHECARY'S OR SURGEON'S BILL.

The plaintiff must, in the first instance, prove his title to sue as an apothecary, for by statute 55 Geo. 3, c. 194, s. 21, (explained and amended by 6 Geo. 4, c. 133,) no apothecary shall be allowed to recover any charges claimed by him in any court of law, unless such apothecary shall prove on the trial, that he was in practice as an apothecary prior to or on the 1st of August, 1815, *see Apothecaries' Comp. v. Roby*, 5 *B. and A.* 952; and it seems, that by 6 Geo. 4, c. 133, s. 5, he must prove himself to have been in practice *on* the first day of August, 1815, or that he has obtained a certificate to practise as

such from the Apothecaries' Company. The statute does not relate to physicians, chemists, or druggists, or to the College of Surgeons. *Sec.* 28, 29. But a person authorised to practise as a physician by a Scotch Diploma, is not a physician within the statute, the provisions of the act applying only to England and Wales. *Apothecaries' Comp. v. Collins,* 4 *B. and Ad.* 604, 1 *Nev. and Man.* 401, *S. C. Collins v. Carnegie,* 3 *Nev. and M.* 703, 1 *Ad. and Ell.* 695, *S. C.* It has been ruled by Best, C. J., that an apothecary may either charge for his attendances, or for the medicines which he supplies, but that he cannot charge for both. *Towne v. Lady Gresley,* 3 *C. and P.* 581; *see Handley v. Henson,* 4 *C. and P.* 110, *post p.* 256.

"*Practice as an apothecary.*"] Merely administering medicines previous to the 1st of August, 1815, will not be sufficient to prove that the party practised as an apothecary, and incapacity to make up the prescriptions of a physician will be cogent evidence to prove the negative. *Apothecaries' Company v. Warburton,* 3 *B. and A.* 40. An unqualified person dispensing medicines of his own advice, is within the *penalties* of the Apothecaries' Act, 55 Geo. 3, c. 194. *The Apothecaries' Company v. Allen,* 1 *Nev. and Man.* 413. It has been ruled by Lord Tenterden, that curing a local complaint is not sufficient evidence that the party compounded medicines according to prescription. To entitle him to sue he must have practised the general duties of an apothecary; *Thompson v. Lewis, M. and M.* 255, 3 *C. and P.* 483, *S. C.*; *viz.,* making up medicines prescribed by a physician or other person, or by himself, *Woodward v. Ball,* 6 *C. and P.* 577. Practice while in the service of another is not a practising within the act. *Brown v. Robinson,* 1 *C. and P.* 264.

Certificate.] By 6 Geo. 4, c. 133, s. 7, the common seal of the Company of Apothecaries is sufficient proof of the certificate, and that the person therein named is qualified to practise: but the seal must be proved to be the seal of the company. *Chadwick v. Bunning, R. and M.* 306, 2 *C. and P.* 106, *S. C.* A *general* certificate, not confining the party to practise in the country, will entitle him to recover for business done in London, although he has only paid 4*l.* 4*s.* the price of the country certificate under 55 Geo. 3, c. 194, s. 19. *Ibid.* The certificate supersedes the necessity of proving an apprenticeship served. *Sherwin v. Smith,* 1 *Bingh.* 204, 8 *B. Moore,* 39, *S. C.*

Where a promissory note was given "in consideration of the plaintiff's care and medical attendance bestowed upon the maker," and notice was given of disputing the consideration

of the note, it was held to be incumbent upon the plaintiff to prove himself qualified by statute 55 Geo. 3, c. 194. *Blogg v. Pinkers, R. and M.* 125.

Surgeon's Bill.

By 3 Hen. 8, c. 11, s. 1, no one shall act as a surgeon within the city of London, or seven miles round, unless he be examined and licensed by the College of Surgeons, under the penalty of 5*l.* per month. It is incumbent upon the defendant, if he intends to avail himself of the plaintiff being unlicensed, to prove that fact; *Gremaire v. Le Clerc Bois Valon*, 2 *Campb.* 143; and it seems that as the statute contains no prohibitory clause, a person, though subject to a penalty, may recover for his labour. *Ibid.*

A surgeon who practises as a physician, having no diploma, cannot maintain an action for his fees; *Lipscombe v. Holmes*, 2 *Campb.* 441; and if in his bill a surgeon leaves a blank for his charge for attendances, and the defendant pays a certain sum into court on that account, the plaintiff is bound by that sum, and cannot recover more. *Tuson v. Batting*, 3 *Esp.* 192.

A surgeon not having a certificate from the Apothecaries' Company, cannot charge for his attendance or for administering medicine, except in cases within his own department. He cannot, therefore, recover for attending a patient in the typhus fever. *Allison v. Haydon*, 4 *Bingh.* 619, 3 *C. and P.* 246, *S. C.* But if the plaintiff be a surgeon and apothecary he may, besides his charges for medicine, recover reasonable charges for attendances. *Handley v. Henson*, 4 *C. and P.* 110.

Defence.

If the defendant has received no benefit, in consequence of the plaintiff's want of skill, the latter cannot recover. *Kannen v. M'Mullen, Peake, N. P. C.* 59. *Duffit v. James, cited* 7 *East*, 480. So a person who professes to cure disorders in a specified time by sovereign remedies, and induces the defendant to employ him, by false and fraudulent representations of his skill, and does not succeed in his cure, cannot recover for medicines and attendance; *Hupe v. Phelps*, 2 *Stark.* 480; but the remuneration of a regular practitioner, who has used due care and diligence, does not depend on his effecting a cure. *Per Abbott, C. J., ibid.* In the case of a medical man, if an operation, which might have been useful, has merely failed in the event, he is, nevertheless, entitled to charge; but if it could have been useful in no event, he would have no claim on the patient. *Dict. Per Alderson, J.*; *Hill v. Feathersonhaugh*, 7 *Bingh.* 574.

A physician can maintain no action for his fees. *Chorly v. Bolcot*, 4 *T. R.* 317.

ASSUMPSIT FOR SERVANTS' WAGES.

In an action by a servant for his wages, the plaintiff must prove a retainer, of which his service will be evidence, the length of time he has served, and the amount of his wages.

A general hiring, without mention of time, is a hiring for a year, and if during the year the master dismiss his servant without cause, the latter is entitled to his wages until the end of the year. *Beeston v. Collyer*, 4 *Bingh.* 309, 2 *C. and P.* 607, *S. C.* And this though the wages are payable monthly. *Fawcet v. Cash*, 3 *Nev. and M.* 177. But if he leaves his service, during the year, without cause, it is a forfeiture of the wages due to him, and he cannot recover anything. *Huttman v. Boulnois*, 2 *C. and P.* 510. With regard to a menial servant, there is a common understanding that the contract may be dissolved by either party—by the master on paying a month's wages or giving a month's warning, by the servant on giving a month's warning. *See Beeston v. Collyer*, 4 *Bingh.* 313. *Nowlan v. Ablett*, 2 *Crom. M. and R.* 54. In such case therefore, if the master, without reasonable cause, turn the servant away, the latter will be only entitled to recover a month's wages. *Robinson v. Hindman*, 3 *Esp.* 235. But other servants, as clerks, &c. may recover their wages for the remainder of the year. *Beeston v. Collyer*, 4 *Bingh.* 309. *Acebal v. Hornor*, 3 *C. and P.* 350. When a master and servant (for a year) part by mutual consent, the servant is entitled to wages *pro ratâ*. *Thomas v. Williams*, 3 *Nev. and M.* 545. 1 *Ad. and Ell.* 685, *S. C.* And where wages are payable quarterly, and the servant is tortiously discharged in the middle of the quarter, he has been allowed to recover for the whole quarter, on the general count for work and labour. *Gandall v. Pontigny*, 4 *Campb.* 375, 1 *Stark.* 198, *S. C.*; *see Eardly v. Price*, 2 *N. R.* 333; *but see Hulle v. Heightman*, 2 *East*, 145. But if a servant misconduct himself, the master may turn him away without any warning; *Spain v. Arnott*, 2 *Stark.* 256; *Trotman v. Dunn*, 4 *Campb.* 212; and in such case, the misbehaviour is a forfeiture of the accruing wages; *Alkin v. Acton*, 4 *C. and P.* 208; *Sherman v. Bennett*, *M. and M.* 489; even though the master has recovered damages against him for his misconduct; *Turner v. Robinson*, 2 *Nev. and M.* 822, 6 *C. and P.* 15, *S. C.*; as where a servant embezzles, though his wages due exceed what he has embezzled. *Brown v. Croft*, 1 *Chitty, Gen. Pr. of the Law*, 81. The bankruptcy of the master is not a dissolution of the contract of hiring and service. *Thomas v. Williams*, 1 *Ad. and Ell.* 685, 3 *Nev. and M.* 545, *S. C.* A servant incapacitated from actual service during part of his time by sickness, is still entitled to recover his wages for the whole period. *R. v. Winterdatt*, *Cald.* 298; *and see Chandler v. Grieves*, 2 *H. Bl.* 606.

ASSUMPSIT FOR NOT ACCEPTING GOODS.

In an action of assumpsit for not accepting goods sold, the plaintiff must prove the contract and breach, the performance of all conditions precedent on his part, and the amount of damage; or such of these facts as are denied by the pleadings.

The contract.] By the seventeenth section of the statute of frauds, 29 Car. 2, c. 3, no contract for the sale of any goods, wares, and merchandises, for the price of 10*l.* sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised.

What contracts are within the seventeenth section of the statute of frauds.] It was formerly thought that executory contracts were not within the statute; *Towers v. Sir J. Osborne*, 1 *Str.* 505; *Clayton v. Andrews*, 4 *Burr.* 2101, *B. N. P.* 279; but that opinion was afterwards exploded; *Rondeau v. Wyatt*, 2 *H. Bl.* 63; *Garbutt v. Watson*, 5 *B. and A.* 613; and therefore it was held that a contract by the plaintiffs, who were millers, for the sale of flour, which was not at the time prepared so as to be capable of immediate delivery, was within the statute. *Garbutt v. Watson*, 5 *B. and A.* 613. But where the contract was not for the sale of goods, but for work and labour and materials found, as in that case the subject matter of the contract did not exist *in rerum naturâ*, and was incapable of delivery and of part acceptance, it was held not to be within the statute. Thus a contract for the purchase of a quantity of oak pins (for upwards of 10*l.*) which were not then made, but were to be cut out of slabs, was held not to be within the statute; *Groves v. Buck*, 3 *Mau. and S.* 178; and upon this principle the case of *Towers v. Osborne*, which was a contract for a chariot not then made, may be supported. *Cooper v. Elston*, 7 *T. R.* 17; *see also Astey v. Emery*, 4 *Mau. and S.* 262; *Smith v. Surman*, 9 *B. and C.* 576. But now by Lord Tenterden's act, 9 Geo. 4, c. 14, s. 7, the above provision of the statute of frauds "shall extend to all contracts for the sale of goods of the value of 10*l.* sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery." To

bring the contract within the statute, the value of the goods must be upwards of 10*l.*, and where several articles are bought at a shop at the same time, but at different prices, each under 10*l.*, but amounting altogether to 70*l.*, it has been held to be one contract and within the statute. *Baldey v. Parker*, 2 *B. and C.* 37; *more fully stated post.* With regard to contracts for the sale of growing crops and timber; *see the cases cited ante p.* 147.

The cases relating to an acceptance of goods within this section of the statute of frauds, are stated under a subsequent head. *Vide post, "Assumpsit for goods sold and delivered."*

Sales by auction, of goods, are within the statute. *Kenworthy v. Schofield*, 2 *B. and C.* 945.

What note or memorandum in writing is sufficient within the seventeenth section of the statute of frauds.] The word *bargain*, used in the statute, means the terms upon which the parties contract. *Per Bayley, J., Kenworthy v. Schofield*, 2 *B. and C.* 947. The price must be stated. *Elmore v. Kingscote*, 5 *B. and C.* 583. The law with regard to the statement of the price in the contract appears to be now settled; that where the price is omitted, and it does not appear upon the evidence that any specific price was agreed upon, a reasonable price may be presumed, and the contract may be so stated; *Hoadley v. M'Laine*, 10 *Bingh.* 482, 4 *Moore and S.* 340, *S. C.*; but that where the contract is silent as to price, and it appears by the evidence that a specific price was agreed upon, the contract is imperfect, and cannot be given in evidence; *Elmore v. Kingscote*, 5 *B and C.* 583, 10 *Bingh.* 489, 4 *Moore and S.* 217, *S. C.*; and it is said by Tindal, C. J., that where the contract is silent as to the price, but has been *executed*, a reasonable price will be inferred, but that it may be questionable whether it is so when the contract is *executory* only, and the goods are still in the possession or under the power of the seller. *Acebal v. Levy*, 10 *Bingh.* 382. "We agree to give Mr. E. 1*s.* 7*d.* per pound for thirty bales of Smyrna cotton, customary allowance, cash 3 per cent., as soon as our certificate is complete,—M. and T." has been held a sufficient memorandum. *Egerton v. Matthews*, 6 *East*, 307; *see Cooper v. Smith*, 15 *East*, 103. *Richards v. Porter*, 6 *B. and C.* 437. As the language of this section is in substance the same as that of the fourth section, relating to the sale of lands, *see* 2 *B. and C.* 947; it will only be necessary to refer to the cases already cited, *ante p.* 176, with regard to the signing of the note or memorandum by the party, and the manner in which two writings may be connected, in order to form a complete note or memorandum.

An auctioneer is the agent of both parties; *Kenworthy v. Schofield*, 2 *B. and C.* 179., *ante p.* 176; and if he writes down the buyer's name, or that of his agent, in the catalogue,

to which the conditions of sale are annexed, opposite the lot, together with the price bid, it seems a sufficient memorandum. *Phillimore v. Barry*, 1 *Campb.* 513. *Kenworthy, v. Schofield*, 2 *B. and C.* 945. But where the conditions of sale are not annexed to the catalogue, and there is no reference to them in the catalogue, signing the buyer's name in the catalogue is not a compliance with the statute. *Hinde v. Whitehouse*, 7 *East*, 558. *Kenworthy v. Schofield*, 2 *B. and C.* 945.

If A., without authority, makes a contract in writing for the purchase of goods by B., and B. subsequently ratifies the contract, such ratification renders the act of A. valid, as an agent within the statute of frauds. *Maclean v. Dunn*, 4 *Bingh.* 722. The authority of the agent to sell for his principal may be conferred orally. *Acebal v. Levy*, 10 *Bingh.* 378, *ante p.* 176.

A broker is the agent of both parties, and may bind them by signing the same contract on behalf of the buyer and seller. Where bought and sold notes have been delivered by the broker to the parties, those notes, and not the entry by the broker in his book, are the proper evidence of the contract; *Thornton v. Meux, M. and M.* 43; and such notes are admissible, though the entry in the broker's book has never been signed by him. *Goom v. Aflalo*, 6 *B. and C.* 117, 9 *D. and R.* 148, *S. C.* If the bought and sold notes materially differ, there will be no valid contract. *Grant v. Fletcher*, 5 *B. and C.* 436. *Thornton v. Meux, M. and M.* 43. A bought note signed by the broker, and delivered to the purchaser, was in one case held not a sufficient note or memorandum within the statute. *Smith v. Sparrow*, 2 *C. and P.* 544; *see Dickenson v. Lilwal*, 1 *Stark.* 129. But in an action by the purchaser against the vendor of goods, for not delivering them, it has subsequently been held that the bought note alone is evidence of the contract, and that if the vendor intends to insist on a variance between the bought and sold note, it is for him to produce the latter. *Hawes v. Forster*, 1 *Moo. and Rob.* 368. If no bought and sold notes have been made out, the entry in the broker's book, signed by him, will be evidence of the contract. *Grant v. Fletcher*, 5 *B. and C.* 436. *Henderson v. Barnewall*, 1 *Y. and J.* 387. And it has been doubted whether or not the broker's book is the best evidence of the contract, which seems to be a matter of fact for the jury. *Hawes v. Forster*, 1 *Moo. and Rob.* 368. Where the broker, in the bought and sold notes, described the seller's firm as A., B., and C.; but the firm had in fact, unknown to the broker, been changed to A., D., and E., it was held that A., D., and E. might sue on the contract, it not appearing that the defendant had been prejudiced or excluded from a set-off, and there being some evidence of his having treated the contract as subsisting with the plaintiffs. *Michell v. Lapage, Holt*, 253. A material alteration in the sale note, by the broker, at the instance of the seller,

after the bargain made, and without the consent of the purchaser, will preclude the seller from recovering. *Powell v. Divett*, 15 *East*, 29.

Performance of conditions precedent.] Where it is the duty of the plaintiff to tender the goods to the defendant, such tender must be averred and proved, if traversed. So in an action for not accepting stock, the plaintiff must show that he has done everything on his part towards the execution of the contract, by proving either a tender or refusal, or that he waited at the bank till the final close of the transfer books, on the day when the stock was to be transferred. *Bordenave v. Gregory*, 5 *East*, 107. But where, by the terms of the contract, it is incumbent on the purchaser to fetch away the goods, the averment and proof of a tender seem to be unnecessary, and it will be sufficient for the plaintiff to aver and prove a readiness to deliver. *See Rawson v. Johnson*, 1 *East*, 203; *Wilks v. Atkinson*, 1 *Marsh*. 412, *post*, *p*. 264.

Damages.—In an action for not accepting goods to be paid for by a bill, the plaintiff is entitled to recover interest from the time the bill, if given, would have become due. *Boyce v. Warburton*, 2 *Campb*. 480. The difference between the contract price and the market price, on the day the contract was broken, is the measure of damages. *Boorman v. Nash*, 9 *B. and C*. 145.

Goods bargained and sold.] If the plaintiff should fail on the special count, he may resort to the count for goods bargained and sold, and will be entitled to recover the whole value of the goods. *Hankey v. Smith*, *Peake*, 42 (*n*). Unless there has been an acceptance of the goods, *see Elliot v. Pybus*, 10 *Bingh*. 512, *post*, a note or memorandum in writing within the 17th sec. of the statute of frauds must be shown, and where the memorandum was silent as to price, but the parol evidence disclosed a contract at the shipping price, it was held that it did not under a count for goods bargained and sold prove a contract at a reasonable price. *Acebal v. Levy*, 10 *Bingh*. 376. Where goods in bulk are sold at so much per ton, an action for goods bargained and sold will not lie, before they have been weighed. *Per Littledale, J., Simmons v. Swift*, 5 *B. and C*. 857. In order to maintain a count for goods bargained and sold it must appear that the property passed, therefore where a machine is ordered to be made, the maker, having completed it, cannot sue for goods bargained and sold if there is no appropriation of the particular machine assented to by the buyer. *Atkinson v. Bell*, 8 *B. and C*. 277. In one case the vendor was allowed to recover on a count for goods bargained and sold, although before action brought he had resold the goods, on the ground that the purchaser might

maintain an action of trover for them. *Mertens v. Adcock*, 4 *Esp*. 251. But in another case it was ruled by Lord Kenyon, that the plaintiff having resold the goods, had, by that act, abandoned his right to insist upon the defendant taking his goods, and could not recover on a count for goods bargained and sold; *Hore v. Milner, Peake*, 42, *a* (*n*); and in a late case, where, by the contract, the vendor had power to resell, the Court of Common Pleas doubted whether such an action could be maintained, after a resale; for by the resale the seller rescinds the contract, and shows his dissent to the contract of bargain and sale. *Hagedorn v. Laing*, 6 *Taunt*. 166; *see also James v. Shore*, 1 *Stark*. 430, *Greaves v. Ashlin*, 3 *Campb*. 426, *Langfort v. Tiler*, 1 *Salk*. 113. But it is now decided that an action *for not accepting* lies against a purchaser who refuses to take goods, although the vendor has resold them. *Maclean v. Dunn*, 4 *Bingh*. 722.

The plaintiffs in London sold to the defendants a quantity of butter, which they expected from Sligo; the quality and price were specified in the contract. The butter was to be shipped for London in October, and to be paid for by bill at two months, from the date of landing. The butter was not shipped till November; but the defendants waived the objection and accepted the invoice and bill of lading. The butter having been lost by shipwreck, it was held that the property had passed to the defendants, and that they might be sued in an action for goods bargained and sold, and *per Park J.*, for goods sold and delivered. *Alexander v. Gardner*, 1 *Bingh. N. C.* 671.

Defence.

If the bulk of goods sold by sample does not accord with the sample, the defendant may insist on it as a defence, although it be proved that the common mode of settling disputes of this kind, is by making an allowance for the difference. *Hibbert v. Shee*, 1 *Campb*. 113. So he may show that the goods do not correspond with the kind mentioned in the contract. *Tye v. Fynmore*, 3 *Campb*. 462; and it has been lately held by the Court of Exchequer, that this defence may still be given in evidence under the general issue. *Cousens v. Padden, MS.* Though the vendee of a specific chattel delivered with a warranty may not have a right to return it (*vide ante p*. 241), the same reason does not apply to the case of executory contracts, where an article, for instance, is ordered from a manufacturer, who contracts that it shall be of a certain quality or fit for a certain purpose, and the article sent as such is never completely accepted by the person ordering it. In this and similar cases the latter may return it as soon as he discovers the defect, provided he has done nothing more in the mean time than was necessary to give it a fair trial; (*Okell v. Smith*, 1 *Stark*. 107;) nor would

the purchaser of a commodity to be afterwards delivered according to sample, be bound to receive the bulk, which may not agree with it; nor after having received what was tendered and delivered as being in accordance with the sample, will he be precluded by the simple receipt from returning the article within a reasonable time for the purpose of examination and comparison. *Per Cur. Street v. Blay*, 2 *B. and Adol.* 463. But where, upon the sale of goods, the seller produces a sample, and represents that the bulk is of equal quality, and there is a sale note which does not refer to the sample, it is no defence that the goods are not equal to the sample. *Meyer v. Everth*, 4 *Campb.* 22; *see also Pickering v. Dowson*, 4 *Taunt.* 779; *Kain v. Old*, 2 *B. and C.* 634. And under a contract to purchase 300 tons of Campeachy logwood, at 35*l.* per ton, to be of real merchantable quality (such as might be determined to be otherwise by impartial judges to be rejected), it was held that the vendee was bound to take so much of the wood tendered, as turned out to be of the sort described, at the contract price, though it appeared at the time that a part, which was afterwards ascertained to be 16 tons, was of a different and inferior description. *Graham v. Jackson*, 14 *East*, 498. The purchaser by sample has a right to inspect the whole in bulk, at any proper and convenient time, and if the seller refuses to show it, may rescind the contract. *Lorymer v. Smith*, 1 *B. and C.* 1; *see Parker v. Palmer*, 4 *B. and A.* 387. If a man sell goods to be delivered on a future day, and neither has the goods at the time, nor has entered into any prior contract to buy them, nor has any reasonable expectation of receiving them by consignment, but means to go into the market and to buy the goods which he has contracted to deliver, he cannot maintain an action upon such a contract. *Per Abbott, C. J., Bryan v. Lewis, R. and M.* 387, *sed quære.*

Where a joint order is given for several articles, at several prices, the contract is entire, and the purchaser may refuse to accept one, unless the others are delivered. *Champion v. Short*, 1 *Campb.* 53; *Baldey v. Parker*, 2 *B. and C.* 37; *and see infra.* And where goods are sold, "about" a certain quantity "more or less," the latter words are intended to provide only for a small excess, and the purchaser is not bound to accept more: thus on a bargain for "about 300 tons more or less," the purchaser is not bound to accept 350 tons. *Cross v. Eglin*, 2 *B. and Adol.* 106.

ASSUMPSIT FOR NOT DELIVERING GOODS.

In assumpsit against the vendor of goods, for not delivering them, the plaintiff must prove the contract and the breach,

ante p. 258, the performance of all conditions precedent on his part, and the amount of damages, or such of these facts as are denied by the pleadings.

Where A. by letter offered to sell to B. certain goods, *receiving an answer by course of post,* and the letter being misdirected by A., the answer notifying the acceptance of the offer arrived two days later than it ought to have done, and on the day following that when it should have arrived, had the first letter been rightly directed, A. sold the goods to a third person, it was held that there was a contract binding the parties from the moment the offer was accepted, and that B. was entitled to recover against A. in an action for the non-delivery. *Adams v. Lindsell,* 1 *B. and A.* 681. But in general, where an offer is made, the party who makes it may retract it at any time before acceptance by the other party. *Cooke v. Oxley,* 3 *T. R.* 653. *Routledge v. Grant,* 4 *Bingh.* 653. So the bidder at an auction may retract his bidding before the hammer is down. *Payne v. Cave,* 3 *T. R.* 148.

The terms of a contract were as follows:—" 1st April. Sold W. P. one bale of sponge at, &c., and bought of him yellow ochre at, &c., the value to be delivered on or before the 24th inst. J. R." In an action by W. P. for not delivering the sponge, it was held that the delivery of the ochre on the 24th, was a condition precedent to the plaintiff's right of action. *Parker v. Rawlings,* 4 *Bingh.* 280.

Where the agreement was to pay such a sum " for each load of straw delivered on the premises," it was held that this imported that each load was to be paid for as delivered, and that the purchaser refusing so to pay, the vendor was not bound to send any more loads. *Withers v. Reynolds,* 2 *B. and Ad.* 882.

In support of the averment that the plaintiff was ready and willing to accept the goods, and to pay for the same, it will not be necessary to prove a tender of the money, it is sufficient to aver that the plaintiff was ready and willing to receive and pay for the goods ; *Rawson v. Johnson,* 1 *East,* 203 ; *Waterhouse v. Skinner,* 2 *B. and P.* 447 ; and a *demand* of the goods seems to be sufficient evidence that the plaintiff was ready and willing. *Wilks v. Atkinson,* 1 *Marsh.* 412. *Levy v. Lord Herbert,* 7 *Taunt.* 318. And it is sufficient if the demand was by the plaintiff's servant. *Squier v. Hunt,* 3 *Price,* 68.

In case the goods are to be delivered at a future day, the damages are, the difference between the contract price and the price of the goods at or about the day when they ought to have been delivered. *Gainsford v. Carroll,* 2 *B. and C.* 624. *Leigh v. Paterson,* 8 *Taunt.* 540. But in an action for not replacing stock at a given day, the plaintiff is entitled to recover according to the price on the day of the trial. *Shepherd v. Johnson,* 2 *East,* 211.

ASSUMPSIT FOR GOODS SOLD AND DELIVERED.

The plaintiff in an action for goods sold and delivered must prove; 1, The contract of sale; 2, The delivery of the goods; 3, The value, where there is no price agreed upon, or such of those facts as are traversed by the pleas. In general, proof of the delivery of the goods to, and receipt of them by the defendant, is *primâ facie* evidence of the contract, and supersedes the proof of an order. *Bennett v. Henderson*, 2 *Stark.* 550.

The contract of sale.] In some cases, where goods have been wrongfully taken, the plaintiff may waive the tort, and sue on the implied contract. Thus where the defendant by fraud procured the plaintiff to sell goods to an insolvent, and afterwards got them into his own possession, he was held liable in an action for goods sold. *Hill v. Perrot*, 3 *Taunt.* 274, *recog. Abbotts v. Barry*, 2 *B. and B.* 369; *but see B. N. P.* 130; *Bennett v. Francis*, 2 *B. and P.* 554. So where a father fraudulently represented that he was about to relinquish his business in favour of his son, to whom (being a minor) goods were, upon such representation, supplied, which the father took into his own hands, he was held liable for goods sold and delivered. *Biddle v. Levy*, 1 *Stark.* 20; *see also Bennett v. Francis*, 4 *Esp.* 30, 2 *B. and P.* 550, *S. C.*; *Read v. Hutchinson*, 3 *Campb.* 352. But where the plaintiff sold to the defendant beer in casks, giving him notice that unless he returned the casks in a fortnight he would be considered the purchaser, and the defendant omitted to return them, Lord Ellenborough held that the defendant was not liable on a count for goods sold and delivered. *Lyons v. Barnes*, 2 *Stark.* 39; *but see Studdy v. Sanders*, 5 *B. and C.* 628. Where the owner of property which has been taken away by another waives the tort, and elects to bring an action of assumpsit for the value, it is incumbent on him to show a clear and indisputable title to that property. *Per Abbott, C. J., Lee v. Shore*, 1 *B. and C.* 97.

The value of *fixtures* cannot be recovered under a count for *goods* sold and delivered; *Lee v. Risdon*, 7 *Taunt.* 188, 2 *Marsh.* 495, *S. C.*; nor the value of standing trees; *Knowles v. Mitchell*, 13 *East*, 249; *see Smith v. Surman*, 9 *B. and C.* 561; but the value of trees which the defendant has purchased, and felled, and carried away, may be recovered under a count for trees sold and delivered. *Bragg v. Cole*, 6 *B. Moore*, 114. The value of growing crops may be recovered on a count for crops bargained and sold; *Parker v. Staniland*, 11 *East*, 362; and crops agreed to be taken by an in-coming from an outgoing tenant, may be recovered under a count for *goods* bargained and sold. *Per Holroyd, J., Mayfield v. Wadsley*, 3 *B. and C.* 364; *see also Poulter v. Killingbeck*, 1 *B. and P.* 397. Where

a person builds a house for another, he is not entitled to recover the value of the materials under a count for goods sold and delivered. *Cotterell v. Apsey*, 6 *Taunt.* 322.

Where the contract was, that certain goods should be paid for partly in money and partly in buttons, Buller, J., held that the plaintiff could not recover under a count for goods sold, but should have declared specially. *Harris v. Fowle, cited* 1 *H. Bl.* 287; *see also Talver v. West, Holt*, 179; *but see Hands v. Burton*, 9 *East*, 349, *supra*. However, where A. agreed to give a horse in exchange for a horse of B. and a sum of money, and the horses were exchanged, but B. refused to pay the money, it was held that it might be recovered under the *indebitatus* count for horses sold and delivered. *Sheldon v. Cox*, 3 *B. and C.* 420. So in an action to recover the value of a gun, for which the defendant was to give another gun and fifteen guineas, Lord Ellenborough was of opinion, that upon the refusal of the purchaser to pay for the gun in that mode, a contract resulted to pay for it in money, and that the value might be recovered under a count for goods bargained and sold. *Forsyth v. Jervis*, 1 *Stark.* 437; *see also Ingram v. Shirley*, 1 *Stark.* 185.

Where it is shown by parol evidence that there has been an agreement for sale at a specific price, the plaintiff cannot on producing a note in writing which is altogether silent as to price, recover on a count upon a sale on a *quantum valebant*. *Acebal v. Levy*, 10 *Bingh.* 383. *Elmore v. Kingscote*, 5 *B. and C.* 583.

By whom sold.] An auctioneer may maintain an action in his own name against the buyer of goods sold by him in the course of his employment. *Williams v. Millington*, 1 *H. Bl.* 81. But the auctioneer has only the same right as the party employing him to sell. *Dickenson v. Naul*, 4 *B. and Ad.* 638.

Proof of delivery.] A party cannot maintain an action for the price of goods sold and delivered, until he has either delivered them, or done something equivalent to delivery, as, for instance, if he has put it in the vendee's power to take away the goods himself. *Per Holroyd, J., Smith v. Chance*, 2 *B. and A.* 755; *but see Thompson v. Maceroni*, 3 *B. and C.* 1. And where A. agreed to sell to B. certain goods, and earnest was paid, and the goods were packed in cloths furnished by B., and deposited in a building belonging to A., till B. should send for them, A. declaring at the same time that they should not be carried away till he was paid, it was held that this was not such a delivery as to entitle A. to maintain an action for goods sold and delivered. *Goodall v. Skelton*, 2 *H. Bl.* 316; *see Simmons v. Swift*, 5 *B. and C.* 857. So where goods sold



for ready money were packed up in boxes of the vendee, for him, and in his presence, but remained at his request on the premises of the vendor, it was held that goods sold and delivered would not lie. *Boulter v. Arnott*, 1 *Crom. and M.* 333. Where there is an entire contract to deliver a large quantity of goods, consisting of distinct parcels, within a specified time, and the seller delivers part, he cannot, before the expiration of that time, bring an action to recover the price of the part delivered, because the purchaser may, if the vendor fail to complete his contract, return the part delivered. But if he retain the part delivered after the seller has failed in performing his contract, the latter may recover the value of the goods which he has so delivered. *Oxendale v. Wetherell*, 9 *B. and C.* 386. *Shipton v. Casson*, 5 *B. and C.* 383. *Walker v. Dixon*, 2 *Stark.* 283. Where goods delivered on sale or return are not returned within a reasonable time, the value may be recovered in an action for goods sold and delivered. *Bailey v. Gouldsmith*, *Peake*, 56. *Coleman v. Gibson*, 1 *Moo. and Rob.* 168.

To whom delivered.] Proof of a delivery to a third person, at the defendant's request, will support a count for goods sold and delivered to the defendant. *Per Cur. Bull v. Sibbs*, 8 *T. R.* 328. A delivery to a carrier, by whom goods are usually sent by the plaintiff to the defendant, is a delivery to the defendant; *Hart v. Sattley*, 3 *Camph.* 528; and it is now held, that if a tradesman order goods to be sent by a carrier, though he does not name any particular carrier, the moment the goods are delivered to the carrier, it operates as a delivery to the purchaser. *Per Cur. Dutton v. Solomonson*, 3 *B. and P.* 584; *Groning v. Mendham*, 5 *Mau. and S.* 189; *but see Anderson v. Hodgson*, 5 *Price*, 630; 2 *Saund.* 47, *k* (*n*). Where a tradesman makes out an account for goods sold, in the name of a particular person, it must be taken that they were furnished on the credit of such person, unless it be shown by *unequivocal evidence*, that the credit was in fact given to another. *Storr v. Scott*, 6 *C. and P.* 241; *and see Thompson v. Davenport*, 9 *B. and C.* 86, *post* 272. In these and similar cases, where the goods are above the value of 10*l.*, a further question may arise, whether or not there has been a sufficient *acceptance* of the goods within the statute of frauds, so as to make the contract valid, when there is no note or memorandum in writing, as to which: *vide infra p.* 273.

Delivery to partner.] A question frequently arises in actions for goods sold and delivered, whether all the defendants are jointly liable as partners. Although the defendant cannot plead the non-joinder of a dormant partner in abatement (*vide post, Assumpsit—Defence*), yet the dormant partner may, at the

option of the plaintiff, be joined as defendant in the action. *Lloyd v. Archbowle*, 2 *Taunt.* 327; *ante p.* 59, *vide the cases cited, infra; and Ruppell v. Roberts*, 4 *Nev. and M.* 31. Though a partnership is constituted by deed, it may, as already stated, *ante p.* 1, be proved by parol evidence. An examined copy of an answer in Chancery by two of the defendants, to a bill of a third defendant, charging them as partners, and praying for an account, is good evidence to prove the partnership, as against the person so answering. *Studdy v. Sanders*, 2 *D. and R.* 347.

Proof that the defendants suffered their names to be used as partners will be sufficient. If it can be proved that the defendant has held himself out to be a partner, not "to the world," for that is a loose expression, but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it, and believed him to be a partner, he is liable to the plaintiff in all transactions in which he engaged and gave credit to the defendant, upon the faith of his being such partner. *Per Parke, J., Dickenson v. Valpy*, 10 *B. and C.* 140. Though, in point of fact, parties are not partners in trade, yet if one so represents himself, and by that means gets credit for goods for the other, both are liable. *Per Lord Kenyon, De Berkom v. Smith*, 1 *Esp.* 29; *see Kell v. Nainby*, 10 *B. and C.* 21. So persons who have been appointed directors of a joint stock company are liable, not having expressly retired from the direction. *Doubleday v. Muskett*, 4 *M. and P.* 750. And if the name of a clerk be used in a firm with his own consent, he is liable to third persons as a partner, though he receives no part of the profits. *Guidon v. Robson*, 2 *Campb.* 302. Persons may be partners in a particular concern or business, yet if they do not appear to the world as general partners, it will not be sufficient to constitute a general partnership, and make them liable in other cases not connected with such particular business. *De Berkom v. Smith*, 1 *Esp.* 29. And where there is a stipulation between A., B., and C., who appear to the world as co-partners, that C., shall not participate in the profit and loss, and shall not be liable as a partner, he is not liable as such to those persons who have notice of this stipulation. *Alderson v. Pope*, 1 *Campb.* 404 (*n*). *Ridgway v. Broadhurst*, 1 *Crom. M. and R.* 415. The plaintiff must show that the name of the party was used in the firm with his own consent. *See Newsome v. Coles*, 2 *Campb.* 617, 2 *H. Bl.* 235 (*n*), 4*th ed.* Thus where a person allows his name to remain in a firm, either exposed to the public over a shop-door, or to be used in printed invoices or bills of parcels, or to be published in advertisements, the knowledge of the party that his name is used, and his assent thereto, is the very ground upon which he is estopped from disputing his liability as a partner. *Per Tindal, C. J., Fox v. Clifton*, 6 *Bingh.*

794; 4 *M. and P.* 714. *S. C.* If a firm, consisting of several, carry on business *in the name of one of the partners*, the whole firm will be bound by acts done by him as representing the firm. *South Carolina Bank v. Case*, 8 *B. and C.* 427. *Vere v. Ashby*, 10 *B. and C.* 293.

The liability of a person as partner may also be proved by showing that he participated in the profits of the concern, and it is immaterial whether he receives the profits for his own use, or as a trustee for others. Thus the executors of a deceased partner carrying on trade for the benefit of the estate, are liable personally as co-partners. *Wightman v. Townroe*, 1 *Maule and S.* 412. However small the portion of profits received, it renders the party liable to all the engagements of the partnership. *R. v. Dodd*, 9 *East*, 527. And it is immaterial whether or not the party dealing with the concern knew at the time of such dealing, that the party whom he charges as a partner participated in the profits. *Ex parte Geller*, 1 *Rose*, 297; *see Vere v. Ashby*, 10 *B. and C.* 288.

The participation to render the party liable must be in the profits *as such*. Therefore a remuneration made to a traveller or other clerk or agent, by a portion of the sums received by or for his master or principal, in lieu of a fixed salary, is only a mode of payment adopted to increase or secure exertion, and does not render the party a partner. *Per Abbott, C. J.*, *Cheap v. Cramond*, 4 *B. and Ald.* 670. So a person employed to sell goods, and who was to have for himself whatever money he could procure for them above a stated sum, was held not to be a co-partner. *Benjamin v. Porteus*, 2 *H. Bl.* 590; *and see Cheap v. Cramond*, 4 *B. and A.* 670. So if there be an agreement between A., the sole owner of a lighter, and B., that the latter shall work the lighter, and in consideration of the working shall have half the gross earnings, this is only a mode of paying wages, and not a partnership. *Dry v. Boswell*, 1 *Campb.* 329. So an agreement that a sailor shall receive a certain share of the produce of the voyage, in lieu of wages, does not make him a partner with the owners of the cargo. *Wilkinson v. Frazier*, 4 *Esp.* 182. *Mair v. Glennie*, 4 *Maule and S.* 244. *R. v. Hartley*, *Russ. and Ry. C. C. R.* 139. But an agreement between two persons, that one of them should make purchases of goods for the other, and in lieu of brokerage should have one-third of the profits arising from the sales, and should bear a certain proportion of the losses, makes the latter liable as a partner as to third persons. *Per Holroyd, J.*, *Smith v. Watson*, 2 *B. and C.* 409. A distinction has been taken between receiving a share of the profits, which renders the party liable as a partner, and relying on the profits as a fund for payment, which will not have that effect. *Grace v. Smith*, 2 *W. Bl.* 998. *Ex parte Hamper*, 17 *Ves.* 404. *Ex parte Rowlandson*, 19 *Ves.* 461. 2 *H. Bl.* 236 (*n*), 4*th ed.*

Where a dormant partner quits the partnership without any public notice, he will not be liable to persons subsequently dealing with the partnership, and who were ignorant that he had ever been a partner. *Carter v. Whalley*, 1 *Barn. and Adol.* 11. *Heath v. Sansom*, 1 *Nev. and M.* 104. Mere knowledge by a creditor of a dissolution of partnership, and his continuing to deal with the new firm, will not release the retiring partner. *Kiruan v. Kiruan*, 4 *Tyr.* 491.

Delivery to wife.] Where the husband and wife live together, and goods are delivered to the wife by her order, a jury may presume the husband's assent. *Bac. Ab. Baron and Feme*, *H.*, 1 *Freeman*, 249 (*n*). And where a husband is living in the same house with is wife, he is liable to any extent for goods which he permits her to receive there. If they are not cohabiting, then he is, in general, only liable for such necessaries as, from his situation in life, it is his duty to supply to her. *Per Lord Ellenborough*, *Waithman v. Wakefield*, 1 *Campb.* 121. And it is the duty of the party seeking to charge the husband to make out by proof that he is liable. *Per Lord Tenterden*, *Clifford v. Laton*, *M. and M.* 102, 3 *C. and P.* 15, *S. C. vide infra.* Where a wife carried on business, on her own account, during the imprisonment of her husband; and after his return, articles were furnished in the same business, with his knowledge, it was held that he was liable for these articles, though the invoices and receipts were made out in the wife's name. *Petty v. Anderson*, 3 *Bingh.* 170. The presumption of the husband's liability may be rebutted by proof that the credit was given to her; *Bentley v. Griffin*, 5 *Taunt.* 356; *Metcalfe v. Shaw*, 3 *Campb.* 22; *see Petty v. Anderson*, 3 *Bingh.* 170; or by proof of any other circumstances negativing the husband's assent; *see Montague v. Benedict*, 3 *B. and C.* 631; as where the wife has a sufficient allowance from her husband during his absence, of which the plaintiff has notice. *Holt v. Brien*, 4 *B. and A.* 252. If the husband and wife have parted by consent, the former remains liable for necessaries supplied to the latter, unless he makes her an adequate allowance; *Hodgkinson v. Fletcher*, 4 *Campb.* 70; *Hindley v. Marquis of Westmeath*, 6 *B. and C.* 211; and unless the plaintiff has notice of the separate maintenance. *Rawlins v. Vandyke*, 3 *Esp.* 250. It is sufficient notice, if the fact was notorious in the place where the parties live. *Todd v. Stokes*, 1 *Ld. Raym.* 444. And where the husband and wife had lived separate for many years, and the wife had resources of her own adequate to her situation, of which the plaintiff had notice, it was held that he could not sue the husband; *Liddlow v. Wilmot*, 2 *Stark.* 88; *see Thompson v. Hervey*, 4 *Burr.* 2177; and even without a knowledge of her being provided for, the creditor, if he gives credit to her, and she is in fact adequately provided for

aliunde, cannot sue the husband. *Clifford v. Laton*, *M. and M.* 101. A husband is liable for necessaries provided for his wife, pending a suit in the ecclesiastical court, and before alimony decreed, although a decree, afterwards made, direct the alimony to be paid from a date before the time when the necessaries were provided. *Keegan v. Smith*, 5 *B. and C.* 375. And after a divorce for adultery in the husband, and a decree of alimony, the husband is liable for necessaries supplied to the wife, if he omit to pay the alimony. *Hunt v. De Blaquiere*, 5 *Bingh.* 550. After a divorce *ab initio*, the liability of the husband for the debts of his wife does not continue. *Anstey v. Manners*, *Gow*, 10. It seems that an express promise made by the husband to pay a debt contracted by the wife after a separation and adequate allowance, will be binding upon him. *Hornbuckle v. Hornbury*, 2 *Stark.* 177; *see* 4 *B. and A.* 254. And so where the wife had a separate maintenance and incurred a debt, which the husband *expressly* promised to pay, Lord Tenterden held him liable. *Harrison v. Hall*, 1 *Moo. and Rob.* 185, *sed quære, see the note*, *Id.* 186.

Where the wife elopes from her husband, and lives in adultery, the husband is not liable for necessaries supplied to her. *Morris v. Martin*, 1 *Str.* 647. And where the husband turns the wife out of doors, on account of her having committed adultery under his roof, he is not liable for necessaries furnished to her after the expulsion. *Ham v. Toovey*, *Selw. N. P.* 260. So if she elopes, though not with an adulterer; *Child v. Hardyman*, 2 *Str.* 875; but if, after an adulterous elopement, he takes her back, he is liable for necessaries subsequently supplied. *Harris v. Morris*, 4 *Esp.* 41.

Where a wife leaves her husband under a reasonable apprehension of personal violence, he is liable for necessaries subsequently furnished to her. *Houliston v. Smyth*, 3 *Bingh.* 127. So if he causelessly turns away his wife, or shuts his door against her; *Langworthy v. Hockmore, cited* 1 *Ld. Raym.* 444; *Rawlins v. Vandyke*, 3 *Esp.* 251; and a notice that he will not be answerable for her debts will not relieve him from his liability. *Boulton v. Prentice*, *Selw. N. P.* 263; *Harris v. Morris*, 4 *Esp.* 42. It lies upon the plaintiff to show, that under the circumstances of the separation, or from the conduct of the husband, the wife had authority to bind him, and this even in an action for necessaries. *Mainwaring v. Leslie*, *M. and M.* 18, 2 *C. and P.* 507, *S. C.* *see ante p.* 270.

The plaintiff must prove, either that the defendant and the woman to whom the goods were delivered are married, which is sufficient *primâ facie* evidence of the defendant's liability, *Car v. King*, 12 *Mod.* 372, *ante p.* 2 (unless they are living apart, *Mainwaring v. Leslie*, *M. and M.* 18, *supra*,) or that she and the defendant cohabited, and that she passed as his wife, with his assent, and it will be no defence that the plain-

tiff knew her not to be his wife. *Watson v. Threlkeld*, 2 *Esp.* 637. *Robinson v. Nahon*, 1 *Campb.* 245. But this only applies where the woman assumes the defendant's name, lives in his house, and is part of his family. *Ibid.* For where the defendant has separated from a woman with whom he has lived as his wife, he is not liable for necessaries subsequently supplied. *Munro v. De Chemant*, 4 *Campb.* 215.

Where the wife ordered goods to be delivered *to her mother*, saying her husband would pay for them, which he did, and subsequently ordered other goods in like manner, it was held that there was evidence to go to the jury of the wife being authorised to order the latter goods. *Filmer v. Lynn*, 4 *Nev. and M.* 559.

Delivery to infant.] The father of an infant to whom goods are supplied is only liable where an actual authority from him to his son is proved, or circumstances appear from which such an authority can be implied. *Baker v. Keen*, 2 *Stark.* 501. *Rolfe v. Abbott*, 6 *C. and P.* 286.

Delivery to overseer.] Where goods are supplied for the use of the poor of the parish, on orders signed by some of the overseers separately, all the persons acting as overseers are liable to be sued, including the assistant overseer. *Kirby v. Bannister*, 3 *Nev. and M.* 119.

Delivery to agent.] Where goods are delivered to an agent, the seller may in general sue the principal. The following has been laid down as the rule on this subject by Lord Tenterden: "If a person sells goods, supposing at the time of the contract that he is dealing with a principal, but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the mean time have debited the agent with it, he may afterwards recover the amount from the real principal; subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal. On the other hand, if at the time of the sale the seller knows not only that the person who is nominally dealing with him is not principal but agent, and also knows who the principal really is, and notwithstanding all that knowledge chooses to make the agent his debtor, then, according to the cases of *Addison v. Gandassequi*, (4 *Taunt.* 574), and *Paterson v. Gandassequi*, (15 *East*, 62), the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between the one and the other." *Thompson v. Davenport*, 9 *B. and C.* 86. The mere knowledge at the time of the contract that there is a principal,

his name not being disclosed, will not prevent the seller who has debited the agent from afterwards resorting to the principal. *Ibid.*

Delivery to servant.] A master is not responsible for goods ordered by his servant, in his name, but without his authority, unless he has been in the habit of paying for goods so ordered. *Maunder v. Conyers*, 2 *Stark.* 281; *Pearce v. Rogers*, 3 *Esp.* 214. If in one instance the master has employed the servant to buy on credit, he will be liable for any goods which the servant subsequently buys on credit; *Hazard v. Treadwell*, 1 *Str.* 506; *Rusby v. Scarlett*, 5 *Esp.* 76; *and see Gilman v. Robinson*, *R. and M.* 227; *Filmer v. Lynn*, 4 *Nev. and M.* 559, *supra*; though he has given the servant money to pay for the goods in the latter instances. *Weyland's case*, 3 *Salk.* 234, 1 *Ld. Raym.* 225; *Rusby v. Scarlett*, 5 *Esp.* 76. When the master gives his servant money to pay for commodities as he buys them, and the servant buys them without paying for them, but embezzles the money, the master is not liable. *Stubbing v. Heintz*, *Peake*, 47.

Acceptance within the statute of frauds.] Where goods above the value of 10*l.* have been sold, and there is no note or memorandum in writing, and no earnest has been given, it frequently becomes a question, whether or not there has been a sufficient acceptance of the goods, or of part of them within the statute of frauds, 29 Car. 2, c. 3, s. 17. *See the section, ante p.* 258. In order to satisfy the statute there must be a delivery of the goods by the vendor, with an intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter, with the intention of taking to the possession as owner; *per Cur. Phillips v. Bistolli*, 2 *B. and C.* 513; and there is not a sufficient acceptance, so long as the buyer continues to have a right to object, either to the quantum or quality of the goods. *Per Cur. Hanson v. Armitage*, 5 *B. and A.* 559. *Smith v. Surman*, 9 *B. and C.* 561. Thus where the defendant bought of the plaintiff's agent twelve bushels of tares (part of a larger quantity in bulk) and the agent measured the twelve bushels and set them apart for the vendee, to remain till called for, it was held that there was no acceptance. *Howe v. Palmer*, 3 *B. and A.* 321. So where A. agreed to purchase a horse from B. for ready money, and to take him within a time agreed upon, and about the expiration of that time, A. rode the horse and gave directions as to its treatment, &c., but requested that it might remain in B.'s possession for a further time, at the expiration o fwhich he promised to fetch it away, and pay the price: these circumstances were held to constitute no acceptance. *Tempest v. Fitzgerald*, 3 *B. and A.* 680. And when a horse

was sold, and no time fixed for payment, and the horse was to remain with the vendors for twenty days, without any charge to the vendee, at the expiration of which time the horse was sent to grass by the direction of the vendee, and by his desire entered as the horse of one of the vendors, it was held that there was no acceptance. *Carter v. Toussaint*, 5 *B. and A.* 855. So a delivery of goods to a wharfinger, who has been accustomed to forward goods from the plaintiff to the defendant, which goods are lost while in the possession of the carrier, is not an acceptance within the statute. *Hanson v. Armitage*, 5 *B. and A.* 557. And where goods bought abroad were delivered at a foreign port on board a ship chartered by the purchaser, this was held to be no acceptance within the statute. *Acebal v. Levy*, 10 *Bingh.* 376, 4 *Moore and S.* 217, *S. C.* When the purchaser appointed the mode in which the goods should be conveyed, and directed a third person in whose possession the goods were, to see them delivered and measured, and put up properly, these circumstances were held not to amount to an acceptance. *Astey v. Emery*, 4 *Maule and S.* 262. The same principle was recognised in the following case: A. went to the shop of B. and Co., and contracted for the purchase of various articles, each of which was under the value of 10*l.* but the whole amounted to 70*l.* A separate price for each article was agreed upon. Some A. marked with a pencil, others were measured in his presence, and others he assisted to cut from larger bulks. He then desired that an account of the whole might be sent to his house, and went away; a bill of parcels was accordingly sent, together with the goods, which A. refused to accept. It was held that this was all one contract, and therefore within the statute of frauds, and that there was no acceptance of the goods to take the case out of that statute. *Baldey v. Parker*, 2 *B. and C.* 37. So where a hogshead of wine in the warehouse of the London Dock Company was sold for 13*l.*, and a delivery order given to the vendee, but there was no assent on the part of the Dock Company to hold the wines as the agents of the vendee, it was held that there was no actual acceptance within the statute of frauds. *Bentall v. Burn*, 3 *B. and C.* 423; *and see Phillips v. Bistolli*, 2 *B. and C.* 511. Where goods of the value of 144*l.* were made to order, and remained in the possession of the vendor at the request of the vendee, with the exception of a small part which the latter took away, it was held that there was no actual acceptance of these goods by the buyer, within the 17th section of the statute of frauds, and that the plaintiff was not entitled to recover on the count for goods sold and delivered; *Thompson v. Maceroni*, 3 *B. and C.* 1; *sed quære*, for the statute only requires an acceptance of *part;* and *quære* whether that case was not decided on the form of declaration which was for *goods sold and delivered.* Where A. employed

B. to construct a waggon, and while the vehicle was in B's yard unfinished, A. employed a third person to fix on some iron work and a tilt; it was held that this did not amount to an acceptance, but *per* Tindal, C. J., it might have been otherwise if these acts had been done after the waggon was completed. *Maberley v. Sheppard*, 10 *Bingh.* 99, 3 *Moore and S.* 436, *S. C.* The traveller of A. and Co. in London, having called upon B. in the country, for orders, B. gave an absolute order for a quantity of cream of tartar, and offered to take a quantity of lac dye, at a certain price; the traveller said the price was too low, but he would write to his principals, and if B. did not hear from them in one or two days, he might consider that his offer was accepted. A. and Co. never wrote to B. but sent all the goods; it was held that this was not a joint order for all the goods, so as to make the acceptance of the cream of tartar, the acceptance of the lac dye also, within 29 Car. 2, c. 3, s. 17. *Price v. Lea*, 1 *B. and C.* 156.

The circumstances in the following cases were held to constitute an acceptance within the statute. The defendant bought a quantity of hay from the plaintiff, and sold it to another person, by whom it was taken away, and it was held that the jury might presume an acceptance by the defendant. *Chaplin v. Rogers*, 1 *East*, 193. The defendant bought two horses from the plaintiff, a livery-stable keeper, and desired him to keep them at livery for him; it was held that the plaintiff, by assenting to this order, and changing the stables in which the horses had been kept, to his livery stables, had relinquished his lien, and that there was a constructive delivery of them to the defendant. *Elmore v. Stone*, 1 *Taunt.* 458; *see* 3 *B. and A.* 324, 5 *B. and A.* 858, 9 *B. and C.* 570. Where A. bargained for a horse then in a stable, and soon afterwards brought in a third person, and stated to him that he had bought the horse, and offered to sell it to him for a profit of 5*l.*, it was held that it ought to be left to the jury to say, whether this was, or was not, a delivery (acceptance). *Blenkinsop v. Clayton*, 7 *Taunt.* 597; *and see Phillips v. Bistolli*, 2 *B. and C.* 511. Where the purchaser of goods at the time of sale wrote his own name upon a particular article, Lord Ellenborough ruled, that if his purpose was to denote that he had purchased it, and to appropriate it to his own use, it was a sufficient acceptance within the statute. *Hodgson v. Le Bret*, 1 *Campb.* 233; *Anderson v. Scot*, *Id.* 274 (*n*); *sed quære, see Baldey v. Parker*, 2 *B. and C.* 37; *ante p.* 274; *Proctor v. Jones*, 2 *C. and P.* 532. Where the goods are ponderous, and incapable of being handed over from one to another, there need not be an actual delivery, but it may be done by what is tantamount, such as the delivery of a key of the warehouse in which the goods are lodged, or by delivery of other *indicia* of property. *Per Ld. Kenyon, Chaplin v. Rogers*, 1 *East*, 194. *Elmore v.*

Stone, 1 *Taunt.* 460. A written order given by the seller of goods to the buyer, directing the person in whose care the goods are to deliver them to the buyer, is sufficient within the statute: *Searle v. Keeves*, 2 *Esp.* 598: if the person to whom it is directed accept the order for delivery, and assent to hold the goods as the agent of the buyer. *Bentall v. Burn*, 3 *B. and C.* 426, *ante p.* 274. Where A. agreed to sell to B. 20 hogsheads of sugar, then in bulk, and filled up and delivered four, and afterwards filled up the remaining sixteen, and gave notice to the defendant, who said he would take them away as soon as he could, this was held equivalent to an actual acceptance of the sixteen hogsheads. *Rohde v. Thwaites*, 6 *B. and C.* 388. The defendant who had ordered a machine to be made without any agreement as to price, paid money on account when he saw it complete; admitted it was made to order, and requested the plaintiff to send it home, but afterwards refused to pay the price demanded by him. The maker refused to deliver the machine without receiving the full amount, for which he ordered his attorney to proceed, when the defendant said he would endeavour to arrange it, if they would give him time. This was held a sufficient acceptance to enable the plaintiff to recover on a count for goods bargained and sold. *Elliott v. Pybus*, 10 *Bingh.* 512, 4 *Moore and S.* 389. *S. C.* The delivery of a sample, if considered to be part of the thing sold, is a sufficient acceptance, but otherwise, where it is a sample merely, and forms no part of the bulk. *Talver v. West*, *Holt*, 178. *Cooper v. Elston*, 7 *T. R.* 14. *Hinde v. Whitehouse*, 7 *East*, 558. If the purchaser draws the edge of a shilling across the hand of the vendor, and returns the money into his own pocket, which in the north of England is called "striking off a bargain," this is no earnest, or part payment within the statute. *Blenkinsop v. Clayton*, 7 *Taunt.* 597. Where goods above 10*l.* are sent for approval, the party must object within a reasonable time, or he will be deemed to have accepted them. *Coleman v. Gibson*, 1 *Moo. and Rob.* 168. *Vide ante p.* 267.

Value.] Where the goods have been sold without any agreement as to the price, their value must be proved. For the cases in which the defendant is entitled to reduce the plaintiff's claim, on account of the inferiority of the goods, *vide next page*. Where the vendor of goods is only able to prove the delivery of a package, without any evidence of the contents, it will be presumed that it was filled with the cheapest commodity in which he deals. *Clunnes v. Pezzey*, 1 *Campb.* 8. If a seller agree to sell a machine at a certain price, and put in materials superior to those contracted for, the purchaser is neither bound to pay a higher price, nor to return the machine. *Wilmot v. Smith*, 3 *C. and P.* 455.

Defence.

Evidence in reduction of damages.] It frequently becomes a question in this action whether the defendant can give the bad quality of the article in evidence, in reduction of the value claimed by the plaintiff. It seems that such evidence is admissible in the following cases, (and, ever since the new rules, under the general issue. *Cousens v. Padden*, *Exch. T. T.* MS.)

1, Where the plaintiff claims only on a *quantum meruit*, and no price has been agreed upon. *Basten v. Butter*, 7 *East*, 479. *Farnsworth v. Garrard*, 1 *Campb.* 38.

2, Where there is a stipulated price, but the defendant, immediately on discovering that the goods do not correspond with the contract, or after giving them a reasonable trial, gives notice to the plaintiff to take them back. If such notice is not given, and the defendant keeps the goods, he is liable to pay the stipulated price. *Grimaldi v. White*, 4 *Esp.* 95. *Fisher v. Samuda*, 1 *Campb.* 190. *Okell v. Smith*, 1 *Stark.* 107. *Groning v. Mendham*, *Id.* 257. *And see Basten v. Butter*, 7 *East*, 484; *Percival v. Blake*, 2 *C. and P.* 514. The doctrine of these cases seems to have been extended somewhat further by the Court of Exchequer, in *Allen v. Cameron*, 1 *Crom. and M.* 832. There the agreement was to pay 220*l.* for young trees for a plantation, to be kept in order, and the court held that if trees of inferior value were introduced, or the trees were not kept in order, the purchaser, in an action for the price, was entitled to a reduction of damages.

3, Where there is a stipulated price, and a warranty as to the quality, in this case the vendee may retain the goods, and set up their inferiority in reduction of damages, although he has not offered to return them, or given any notice to the vendor. *Cormack v. Gillis*, *cited* 7 *East*, 480. *Fielder v. Starkin*, 1 *H. Bl.* 17. *Patteshall v. Tranter*, 4 *Nev. and M.* 649. *Germaine v. Burton*, 3 *Stark.* 32. *Poulton v. Lattimore*, 9 *B. and C.* 259. *Street v. Blay*, 2 *B. and Adol.* 456. But if the vendee proceed to use the goods, though warranted, without any notice to the vendor of their inferiority, and so deprive him of the means of ascertaining their real value, the vendor may recover his whole demand. *Hopkins v. Appleby*, 1 *Stark.* 477. Still, if from the nature of the article it must be used, in order to ascertain whether the warranty has been complied with (as in the case of seeds), the purchaser may insist upon the warranty, without having given any notice. *Poulton v. Lattimore*, 9 *B. and C.* 259.

Where a bill of exchange has been given for the amount of goods sold, the defendant cannot afterwards question the reasonableness of the demand. *Knox v. Whalley*, 1 *Esp.* 159.

Action brought before credit expired.] Whether since the new rules it can be shown under *non assumpsit* that the action

has been brought before the time of credit expired does not appear to be well settled. In *Edmunds v. Harris*, 4 *Nev. and M.* 182. 6 *C. and P.*, *S. C.*, where this defence was attempted to be given in evidence under the plea of *nil debet* in an action of debt, the court held it inadmissible, but in a subsequent case the Court of Common Pleas refused to grant a rule to permit the defendant to plead this defence specially, and also the general issue, holding it to be admissible under the latter plea. *Gardner v. Alexander*, 3 *Dowl. P. C.* 146.

Where goods are fraudulently bought on credit, the seller cannot sue for goods sold and delivered, before the credit has expired, though he might have maintained trover. *Ferguson v. Carrington*, 9 *B. and C.* 59, 3 *C. and P.* 457, *S. C.* *Strutt v. Smith*, 1 *Crom. M. and R.* 312. What is sufficient proof of the time of the commencement of the action has been already stated, *ante p.* 252. Where a person purchases goods, and agrees to pay for them in three months, by a bill at two months, which bill he afterwards refuses to give, an action for goods sold and delivered will not lie till the expiration of the five months. *Mussen v. Price*, 4 *East*, 147. *Lee v. Risdon*, 2 *Marsh.* 495. So where goods are sold at six months' credit, payment to be then made by a bill at two or three months, at the purchaser's option; this is in effect a nine months' credit. *Helps v. Winterbottom*, 2 *B. and Adol.* 431. But where goods were sold at three months' credit, the vendor agreeing to take the vendee's bill at three months' date, at the end of the first three months, if he wished for further time, and the vendee at the end of the three months did not give such bill, Lord Ellenborough held that the vendor might bring an action for goods sold and delivered immediately. *Nickson v. Jepson*, 2 *Stark.* 227. And where bills are given for goods, and dishonoured, the vendor may sue for the price of the goods immediately; *Hickling v. Hardey*, 7 *Taunt.* 312, 1 *B. Moore*, 61, *S. C.*; *Mussen v. Price*, 4 *East*, 151; provided the bills are in the hands of the seller; but if they are in the hands of third persons, that is a defence to the action, for the defendant may be called upon by those persons to pay the bills. *Kearslake v. Morgan*, 5 *T. R.* 513. *Burden v. Halton*, 4 *Bingh.* 455. Where the buyer gives a promissory note of another person, without indorsing it, the vendor may, on its dishonour, sue for the price of the goods, without proving presentment to the maker, the note being produced by himself. *Goodwin v. Coates*, 1 *Moo. and Rob.* 221. Where the vendor takes a bill on a wrong stamp, in suing for the price of the goods he need not prove the dishonour of the bill. *Cundy v. Marriott*, 1 *B. and Ad.* 696. But if he makes a bill his own by laches, it operates in satisfaction of the preceding debt; so if he makes it his own by altering it in a material part. *Alderson v. Langdale*, 3 *B. and Ad.* 660. If, by the contract, it is agreed that a bill at a certain date should be given, it operates as a giving of credit;

and although no bill should be given, the seller cannot sue the purchaser for goods sold and delivered, before the period when the bill, if given, would have become due. *Mussen v. Price*, 4 *East*, 154, *supra*. Upon a sale of goods at six or nine months, the purchaser, by not paying at the end of six months, makes his election to take credit for the nine months. *Price v. Nixon*, 5 *Taunt*. 338, *vide supra*.

As to the defence of illegality in this action, *vide post*, "*Assumpsit—Defence*." And as to the defence of the goods not being conformable to sample or order, *vide ante p*. 262.

ASSUMPSIT FOR WORK AND LABOUR.

In an action for work and labour, the plaintiff must prove, 1, The contract; 2, The performance of the work and labour at the defendant's request; and 3, The value.

The contract.] Although a special contract has been entered into, the plaintiff is permitted, in certain cases, to recover upon the general *indebitatus* count. Whenever the duty of the defendant arising upon the execution of the consideration is simply to pay money, the usual and safest mode of pleading is, to declare in *indebitatus assumpsit*, as in the case of goods sold, work and labour done, and other cases. *Per Park, J.*, *Streeter v. Horlock*, 1 *Bingh*. 37. And where there is a special agreement, the terms of which have been performed, it raises a duty for which an *indebitatus* assumpsit will lie. *B. N. P.* 139. *Robson v. Godfrey*, *Holt*, 237. *Study v. Sanders*, 5 *B. and C*. 638. So if there is a special agreement, and the work has been done, though not pursuant to such agreement, the plaintiff may recover upon the *quantum meruit*, for otherwise he would not be able to recover at all. *Ibid*. But the defendant may refuse to take to the subject matter of the plaintiff's work and labour, where there is a deviation from the special contract; and, in such case, the plaintiff cannot recover on the *quantum meruit*; *see Ellis v. Hamlen*, 3 *Taunt*. 52, 4 *Taunt*. 748; though it is otherwise where the defendant has acquiesced in and adopted the deviations. *Burn v. Miller*, 4 *Taunt*. 745. Where there is a special contract, but additional work has been done, not included in the special contract, the value of the additional work may be recovered under the *indebitatus* count, although from the stipulations of the special contract as to credit, &c. the value of the work done under the special contract cannot be recovered. *Robson v. Godfrey*, *Holt*, 236, 1 *Stark*. 275, *S. C.* The rule with regard to alterations, where there is a special contract, must be taken with this limitation, that the workman shall not charge for such alterations unless

his employer is expressly informed, or must necessarily from the nature of the work, be aware, that the alterations will increase the expense. *Lovelock v. King*, 1 *Moo. and R.* 60. Where the special contract is so entirely abandoned that it is impossible to trace it, the workman shall be permitted to charge for the whole work done, by measure and value, as if no contract had ever been made; but if not wholly abandoned, the contract shall operate as far as it can be traced, and the excess only shall be paid for according to the usual rate of charging. *Pepper v. Burland, Peake*, 103. Where there is a written contract it must be produced, although the plaintiff seeks to recover for *extras*, and the defendant has admitted one of the items to be *extra*. *Vincent v. Cole, M. and M.* 257. But where a man is employed to do work under a written contract, and a separate order for other work is afterwards given by parol, during the continuance of the first employment, the written contract need not be produced by the plaintiff in an action for the second work. *Reid v. Batte, M. and M.* 413.

Where the defendant had contributed to the funds of a building society, and had been present at a meeting of the society, and party to a resolution that certain houses should be built, it was held that this made him liable to an action for work done in building those houses, without proof of his having an interest in them or in the land. *Braithwaite v. Skofield*, 9 *B. and C.* 401. So the subscribers who attend a committee for managing the affairs of a hospital are personally liable to the creditors of the hospital. *Burls v. Smith*, 7 *Bingh.* 705; *see Glenester v. Hunter*, 5 *C. and P.* 63; *Pink v. Scudamore, Id.* 72.

Where the defendant requested the plaintiff to take care of and show his (the defendant's) house, and promised to make him a handsome present, it was held that the plaintiff might recover a reasonable recompense for this work and labour; *Jewry v. Busk*, 5 *Taunt.* 302; but where a person performed work for a committee, under a resolution entered into by them, "that any service rendered by him should be taken into consideration, and such remuneration be made as should be deemed right," it was held that an action would not lie to recover a recompense for such work. *Taylor v. Brewer*, 1 *Maule and S.* 290. There is no implied assumpsit to pay an arbitrator for his trouble. *Verany v. Warne*, 4 *Esp.* 47; *but see* 1 *Gow*, 8, *per Dallas, C. J., contra.*

A master may maintain assumpsit for the work and labour of his apprentice, against a person who harbours him after his desertion, for he may waive the tort, and sue on the implied contract. *Foster v. Stewart*, 3 *Maule and S.* 191.

Under the general count for work and labour, the plaintiff may give evidence of a particular species of work and labour as a farrier, and the medicines administered by him may be

considered as *materials* within the count; *Clarke v. Mumford*, 3 *Campb.* 37; *and see Meeke v. Oxlade*, 1 *Bos. and Pul. N. R.* 289; but where the claim "for materials found," &c. was omitted in the count for work and labour, it was held that the plaintiff, who sought to recover for building a house and furnishing the timber, could not recover for the latter under the count for goods sold and delivered. *Cotterell v. Apsey*, 6 *Taunt.* 322.

An action for work and labour will not lie by a person who manufactures a chattel out of his own materials. The rule is thus laid down by Mr. Justice Bayley: "If you employ a man to build a house on your land, or to make a chattel with your materials, the party who does the work has no power to appropriate the produce of his labour and your materials to any other person. Having bestowed his labour, at your request, on your materials, he may maintain an action against you for work and labour. But if you employ another to work up his own materials in making a chattel, then he may appropriate the produce of that labour and materials to any other person. No right to maintain any action vests in him during the progress of the work; but when the chattel has assumed the character bargained for, and the employer accepted it, the party employed may maintain an action for goods sold and delivered, or if the employer refuses it, a special action on the case for such refusal, but he cannot maintain an action for work and labour, because the labour was bestowed on his own materials, and for himself, and not for the person who employed him." *Atkinson v. Bell*, 8 *B. and C.* 283.

Contract.—Repairs of ships.] Registered ownership (that is, proof of the register, and that such register has been made with the assent of the parties therein named) is *primâ facie* evidence of the liability of those parties for the repairs of the ship; *Cox v. Reid*, *R. and M.* 199; but such evidence may be rebutted by proof of the beneficial interest having been parted with, and of the legal owner having ceased to interfere with the management of the ship. *Jennings v. Griffiths*, *R. and M.* 42. *Young v. Brander*, 8 *East*, 10. The true question in matters of this description is, "Upon whose credit was the work done?" *Per Abbott, C. J.*, *Jennings v. Griffiths*, *R. and M.* 43; *see Essery v. Cobb*, 5 *C. and P.* 358; *Castle v. Duke*, *Id.* 359. So a person who takes a share in a ship, under a void conveyance, is not liable for articles furnished to the ship, unless credit be given to him individually, or he holds himself out as owner. *Harrington v. Fry*, 2 *Bingh.* 179. An undertaking by the defendant's attorney "to appear for Messrs. T. and M. joint owners of the sloop A." is evidence against the defendants of the joint ownership. *Marshall v. Cliff*, 4 *Campb.* 133. A part owner of a ship is not necessarily a partner; and

if, as ship's husband, he has fitted her out he may sue the other part owners separately for their share of the expense. *Helme v. Smith*, 7 *Bingh.* 709.

Whether a mortgagee of a ship, before possession, was liable to repairs, was formerly much doubted; *see Briggs v. Wilkinson*, 7 *B. and C.* 30; but now, by recent acts of parliament, when a transfer is made only as a security for the payment of debts, by way of mortgage, or of assignment to trustees by way of sale, on a statement being made in the book of registry, and in the indorsement on the certificate of registry to that effect, the person to whom the transfer is made, or any other claiming under him, is not to be deemed the owner, nor is the person making such transfer to be deemed to have ceased to be an owner, except so far as may be necessary for the purpose of rendering the ship transferred available by sale or otherwise, for the payment of those debts, to secure the payment of which the transfer was made. 4 *G.* 4, *c.* 41, *s.* 43, 6 *G.* 4, *c.* 110, *s.* 45. *Abbot on shipping*, 17, 5*th ed.*

Performance at the defendant's request.] The plaintiff must prove a performance of the work and labour, according to the terms of the contract, or if there is a deviation from those terms, an acquiescence by the defendant in the deviation, *vide supra*. Thus in an action to recover the value of a riding-habit, for which the defendant's wife had been measured, but which was returned to the plaintiff on the day on which it was delivered, it was ruled to be incumbent on the plaintiff to prove that the habit was made agreeably to the order. *Hayden v. Hayward*, 1 *Campb.* 180. So a herald, who sues for making out a pedigree, is bound to give some general evidence of the truth of the pedigree. *Townsend v. Neale*, 2 *Campb.* 191.

In general, the contract will be evidence that the work has been performed at the defendant's request, or the request may be inferred from the defendant's acquiescence in the work which is carrying on upon his premises, or from his voluntarily availing himself of the benefit of the plaintiff's services. 3 *Stark. Ev.* 1763, 1*st ed.* Where A., who was employed by the defendant to transport goods to a foreign market, delegated the entire employment to the plaintiff, who performed it without the privity of the defendant, it was held that the plaintiff could not recover from the defendant a compensation for such service. *Schmaling v. Tomlinson*, 6 *Taunt.* 147.

Value.] In what manner the value of the work is to be calculated where there is a special contract and deviations from it has been already mentioned, *ante, p.* 279. When work is undertaken on a contract at a given price, the employer is not liable to any greater amount by consenting to alterations from the original plan, unless he is either expressly informed, or

from the nature of the alterations must necessarily know, that the alterations will increase the expense. *Lovelock v. King*, 1 *Moo. and Rob.* 60. Where a tradesman finishes work, differing from the specification agreed on, he is not entitled to recover the actual value of the work done, but only the stipulated price, minus such a sum as it would take to complete the work according to the specification. *Thornton v. Place*, 1 *Moo. and R.* 218; *see Chapel v. Hicks*, 2 *Crom. and M.* 214, 4 *Tyr.* 43, *S. C.* In an action for work and labour as a surveyor, Lord Kenyon held that the plaintiff was only entitled to a reasonable compensation, not to be estimated by the amount laid out by the defendant in the building, which is the custom with surveyors. *Upsdell v. Stewart, Peake*, 193. But in a subsequent case, Lord Ellenborough left it to the jury, to say whether the usual commission of five per cent. was a vicious or unreasonable mode of charging, and the jury found or the plaintiff for the whole demand. *Chapman v. De Tustet*, 2 *Stark.* 294; *see also Maltby v. Christie*, 1 *Esp.* 340.

Defence.

Where the work has not been executed according to the contract, the party for whom it is executed may repudiate it, and in such case the plaintiff cannot recover. *Ellis v. Hamlen*, 3 *Taunt.* 52, *ante, p.* 279. So if the defendant has received no benefit, from the work having been improperly executed by the plaintiff, the latter cannot recover. *Farnsworth v. Garrard*, 1 *Campb.* 38. *Duncan v. Blundell*, 3 *Stark.* 6. *Montriou v. Jefferys, R. and M.* 317, *ante, p.* 253. Thus an auctioneer, through whose gross negligence the sale becomes nugatory, can recover nothing for his services. *Denew v. Daverell*, 3 *Campb.* 451. But where the defendant has derived some benefit from the plaintiff's service, he must pay *pro tanto*; *Farnsworth v. Garrard*, 1 *Campb.* 38; and if he seeks to reduce the plaintiff's damages, on account of a non-compliance with the terms of the contract, he should, as it seems, give notice to the plaintiff that he considers the contract not complied with. *See ante, p.* 277. However, in a late case, where the plaintiff had contracted to repair some chundeliers for 10*l.*, and returned them incompletely repaired, in an action for work and labour it was held that as the plaintiff had not performed his part of the contract he could not recover any thing, though the jury found that the repairs were worth 5*l.* *Sinclair v. Bowles*, 9 *B. and C.* 92. The contract in the above case was to do a specific work for a specific sum. But where a shipwright undertook to put a ship into thorough repair (which had put into port damaged), and before the work was finished, required payment for the portion done, without which he refused to proceed, and the ship lost her voyage; in an action for the work done,

it was held that he was entitled to recover. *Roberts v. Havelock*, 3 *B. and Ad.* 404.

As to the defence of illegality in this action, *vide post*, "*Assumpsit—Defence.*"

ASSUMPSIT FOR MONEY PAID.

The plaintiff, in an action of assumpsit for money paid must prove, 1, The payment of the money; 2, That it was paid at the request of the defendant.

The payment of money.] The plaintiff must prove that *money* was paid, the giving a security, as a bond or warrant of attorney, is not sufficient; *Taylor v. Higgins*, 3 *East*, 169; *Maxwell v. Jameson*, 2 *B. and A.* 51; unless, perhaps, where a bill or note is taken as payment. *Barclay v. Gooch*, 2 *Esp.* 571. So stock cannot be considered as money. *Jones v. Brin*, 1 *East*, 1. The plaintiff must prove that the money paid was *his* money. Thus, an under-tenant, whose goods have been distrained and sold by the original landlord, for rent due from his immediate tenant, cannot maintain an action for money paid to the use of the latter; for immediately on the sale under the distress, the money paid by the purchaser vests in the landlord, in satisfaction of the rent, and never was the money of the under-tenant. *Moore v. Pyrke*, 11 *East*, 52.

The defendant's request.] The plaintiff must prove a request by the defendant, express or implied. Thus if the plaintiff has paid the money without the defendant's request, though to discharge a just debt, no action will lie; *Stokes v. Lewis*, 1 *T. R.* 20; as where a broker purchases stock, to fulfil a contract entered into by him for his principal, but which his principal refuses to make good. *Child v. Morley*, 8 *T. R.* 614. So where the party to whom the stock was contracted to be sold, on the defendant's refusal to transfer, bought the stock himself, and brought assumpsit for money paid, to recover the difference in the price of the stock, it was held, that the action could not be sustained. *Lightfoot v. Creed*, 8 *Taunt.* 268. A subsequent assent to the payment will be evidence of a previous request. 1 *Saund.* 264 (*n*), 5*th ed.*

A payment by the plaintiff, under a legal obligation, will also be evidence of a previous request, as where one person is surety for another, and is called on to pay, the money paid may be recovered, though the surety did not pay the debt by the desire of the principal. *Per Ld. Kenyon, Exall v. Partridge*, 8 *T. R.* 310. In such an action, the plaintiff must prove the contract of indemnity, and that it was entered into at the request of the defendant, and that he has paid the money gua-

ranteed. So where several are sureties and one is compelled to pay the whole, he may recover from each of his co-sureties a rateable proportion of the money so paid; *Cowell v. Edwards*, 2 *B. and P.* 268; *Deering v. Winchelsea, id.* 270; but there is no such contribution between wrong-doers. *Merryweather v. Nixan*, 8 *T. R.* 186. There may however be contribution between *tort-feasors*, if the plaintiff was not aware that the transaction was illegal, or if its nature was doubtful. *Betts v. Gibbins*, 4 *Nev. and M.* 64. Where one bail sues his co-bail for contribution, he must prove the judgment, as well as the execution. *Belldon v. Tankard*, 1 *Marsh.* 6. Where the goods of the plaintiff, in the house of the defendant, are seized for rent due from the defendant, the plaintiff may recover in this action the money which he has paid to redeem them. *Exall v. Partridge*, 8 *T. R.* 308. *Dawson v. Linton*, 5 *B. and A.* 521. *See Spencer v. Parry*, 4 *N. and M.* 770. So an accommodation acceptor, who has defended an action on the bill, at the request of the drawer, may recover the costs of such action, as money paid. *Howes v. Martin*, 1 *Esp.* 162. So also the indorser of a bill who has been sued by the holder and paid him part of the amount of the bill, may recover that amount in an action for money paid, against the acceptor. *Pownall v. Ferrand*, 6 *B. and C.* 439. But he cannot recover the costs of the former action. *Dawson v. Morgan*, 9 *B. and C.* 618. A person who pays a bill for the honour of one of the parties to it may sue him for money paid. *Smith v. Nissen*, 1 *T. R.* 269. But he must prove that a formal protest was made before the payment. *Vandewall v. Tyrell*, *M. and M.* 88. Bail may recover, as money paid, the expenses incurred by them in taking their principal, but not the costs of an action against them, unadvisedly defended. *Fisher v. Fellows*, 5 *Esp.* 171. A notice to the party for whom the indemnity is given, is not necessary before defending an action on the guarantee; but if such notice is given, and he refuses to defend the action against the party indemnifying, the party to whom the notice was given is estopped from saying, that the former was not bound to pay the money. *Duffield v. Scott*, 3 *T. R.* 374. *Smith v. Compton*, 3 *B. and Ad.* 408. Money paid lies against a ship-owner for money supplied to the captain, either in a foreign or English port, for necessary repairs, provided it be expressly borrowed for that purpose, *Thacker v. Moates*, 1 *Moo. and Rob.* 79, and be so applied, to prove which the captain is an admissible witness. *Rocher v. Busher*, 1 *Stark.* 27. *Palmer v. Gooch*, 2 *Stark.* 428. *Robinson v. Lyall*, 7 *Price*, 392. Where a carrier, by mistake, delivered to B. goods sold and consigned to C., and B. appropriated the goods, and the carrier, on demand without action, paid C., it was held that the carrier might recover from B. the sum so paid, as money paid to his use; *Brown v. Hodgson*, 4 *Taunt.* 189; 4 *N. and M.* 776;

but Lord Ellenborough, in a similar case, ruled that it was necessary to declare specially. *Sills v. Laing*, 4 *Camph.* 81. Where a party is compelled to pay money in consequence of his own neglect; *Capp v. Topham*, 6 *East*, 392; or breach of duty; *Pitcher v. Bailey*, 8 *East*, 171; the law raises no implied promise to repay him. If the money is paid in furtherance of an illegal transaction, it cannot be recovered. *Mitchell v. Cockburne*, 2 *H. Bl* 380; *Aubert v Maze*, 2 *B. and P.* 371; *and see Cannan v. Bryce*, 3 *B. and A.* 179, *and post.*

ASSUMPSIT FOR MONEY LENT.

In an action of assumpsit for money lent, the plaintiff will only have to prove the loan of his money. Of this a promissory note given by the defendant to the plaintiff will be evidence *Story v. Atkins*, 2 *Str.* 719; *and see ante p.* 223. To establish a loan, it is not sufficient merely to prove the payment of money to the defendant, for in such case the presumption of law is that the money is paid in liquidation of an antecedent debt; *Welsh v. Seaborn*, 1 *Stark.* 474; but if the plaintiff can show any money transactions between the defendant and himself, from which a loan may be inferred, or any application by the defendant to borrow money at the time, this, coupled with the passing of the money, will be evidence of a loan. *Carey v. Gerrish*, 4 *Esp.* 9. If a parent advances money to a child, it is supposed to be by way of gift. *Per Bayley, J.*, *Hick v. Keats*, 4 *B. and C.* 71. It was formerly held that interest was not recoverable on money lent, unless there be a contract or usage to that effect; *Calton v. Bragg*, 15 *East*, 223; but if the course of dealing between the parties was such, interest upon interest might be recovered. *Newell v. Jones*, 4 *C. and P.* 124, *vide infra.* And now by statute 3 and 4 W. 4, c. 42, s. 28, interest is recoverable on money lent to be repaid on a day certain, or, if not to be so repaid, from the time of demand in writing. A lender who has received goods as a security, may recover in an action for money lent, without proving that he has returned or tendered the goods. *Lawton v. Newland*, 2 *Stark.* 73.

ASSUMPSIT FOR MONEY HAD AND RECEIVED.

In an action for money had and received, the plaintiff must prove the receipt of the money by the defendant, and his own title to recover it. This action cannot be maintained if it be against equity and good conscience that the money should be

recovered. Thus where A. purchased an annuity for her life, which was regularly paid up to the time of her death, but no memorial of the grant of the annuity was inrolled, it was held that A.'s executrix could not on that ground insist that the contract was void, and recover back the consideration money paid for the annuity. *Davis v. Bryan*, 6 *B. and C.* 651.

Receipt of the money.] The plaintiff must prove that *money* has been received, and therefore an action for money had and received will not lie to recover *stock*; *Nightingal v. Devisme*, 5 *Burr.* 2589; and it has been held that it will not lie against a finder of bank-notes, to recover their value; *Noyes v. Price*, *H.* 16 *G.* 3, *Select Ca.* 242; *Chitty's Bills*, 426, *5th ed.*; though, if not produced at the trial, the receipt of their value will be presumed; *Chitty, ubi sup. citing Longchamp v. Kenny*, *Dougl.* 138; *see Harrington v. Macmorris*, 5 *Taunt.* 228; *vide supra.* The value of provincial notes, received as money, may be recovered in this action. *Pickard v. Bankes*, 13 *East*, 20. *Fox v. Cutworth, cited* 4 *Bingh.* 179. Where the defendant, who was sued for the proceeds of a bill, admitted that he had paid it into his banker's, and the banker's clerk was called to prove that credit was given to the defendant for the bill, it was held that this evidence was insufficient without the production of the bill. *Atkins v. Owen*, 4 *Nev. and M.* 123. The principle in all the cases is, that if a thing be received as money, it may be treated and recovered as such. *Per Best, C. J.*, *Spratt v. Hobhouse*, 4 *Bingh.* 179. If an agent refuses to account for goods delivered to him for sale, it shall be presumed, after a reasonable time, that he has sold them and received the proceeds in money. *Hunter v. Welsh*, 1 *Stark.* 224. The plaintiff must give some evidence of a particular sum; and if he gives no evidence of the amount due he must be nonsuited. *Harvey v. Archbold*, 5 *D. and R.* 504; *and see Bernasconi v. Anderson*, *M. and M.* 183; *Leeson v. Smith*, 4 *Nev. and M.* 304.

Receipt of money by the defendant.] The plaintiff must prove that the money has been received to his use *by the defendant.* The mere bearer of money from one person to another, cannot be sued. *Coles v. Wright*, 4 *Taunt.* 198. So an agent who has paid money over, pursuant to the directions of the party depositing it with him, and without notice of the plaintiff's title, cannot be sued; but merely passing it in account is not a payment; *Buller v. Harrison*, *Coup.* 565; *Horsefall v. Handley*, 8 *Taunt.* 136; and until there has been a change of circumstances by his having paid over the money to his principal, or done something equivalent to it, he remains liable. *Cox v. Prentice*, 3 *Maule and S.* 344. So if he pays

it over, after notice that the right to it is disputed. *Edwards v. Hodding*, 5 *Taunt.* 181; *vide ante p.* 181. A receipt signed by an agent for his principals, for "S. and W.," "W. R." is not evidence to support an action for money had and received against the agent. *Edden v. Read*, 3 *Campb.* 339. So where an attorney's clerk, in the absence of his master, received a sum of money due to the plaintiff, one of his master's clients, and gave a receipt, "B. for Mr. J.," and his master never returning, the clerk refused to pay over the money to the plaintiff; it was held that no action lay against the clerk, there being no privity between him and the plaintiff. *Stephens v. Badcock*, 3 *B. and Ad.* 354. A person acting as a trustee (as the provisional assignee of a bankrupt), is not, in general, liable in this action, for money received by an agent appointed by him with due care, and not paid over. *Raw v. Cutten*, 9 *Bingh.* 96. Where money in litigation between two parties has by consent been paid over to a stakeholder, in trust for the party entitled, it can only be recovered from the stakeholder, and not from the original debtor. *Ker v. Osborne*, 9 *East*, 378. In general an agent must account to his principal, and cannot set up the *jus tertii* in an action brought by him. *Nicholson v. Knowles*, 5 *Mad.* 47. *Crosskey v. Mills*, 1 *Crom. M. and R.* 298. *White v. Bartlett*, 9 *Bingh.* 378. Where an agent receives money, to pay over to a third person, he continues to be accountable to his principal, until he has entered into some binding engagement with that third person, to hold the money to his use, and not until then will he be liable to the third person, in an action for money had and received. *Baron v. Husband*, 4 *B. and Ad.* 612. *Williams v. Everett*, 14 *East*, 582. *Wedlake v. Hurley*, 1 *Crom. and J.* 83.

On failure of, or without consideration.] Where money has been paid on a consideration which has wholly failed, it may be recovered in this action by the party who has paid it. Thus if an annuity be defective, and the deeds are set aside, the consideration money may be recovered. *Shove v. Webb*, 1 *T. R.* 732. So where one of several securities securing the annuity fails. *Scurfield v. Gowland*, 6 *East*, 241. In such an action the deeds should be produced and their execution proved, and the setting them aside proved by the production of the rule of court. 2 *Stark. Ev.* 215 (*n*), *1st ed.* The receipt of the money must also be proved. The defendant in these cases may deduct the payments made by him in respect of the annuity. *Hicks v. Hicks*, 3 *East*, 16; *see Davis v. Bryan*, 6 *B. and C.* 651, *supra p.* 286. Where a scheme for establishing a tontine was put forth, stating that the money subscribed was to be laid out at interest, and after some subscriptions had been paid by the directors, in whom the management of the concern was vested, but before any part of the money was

laid out at interest, the directors resolved to abandon the project, it was held that each subscriber might, in an action for money had and received, recover the whole of the money advanced by him, without any deduction for expenses. *Nockels v. Crosby*, 3 *B. and C.* 814. So the money paid for the purchase of shares in a joint stock company, may, under similar circumstances, be recovered. *Kempson v. Saunders*, 4 *Bingh.* 5. Where a fixed sum has been paid to the parish by the putative father of a bastard, and the child dies, the residue of the sum unexpended may be recovered in this action. *Watkins v. Hewlett*, 1 *B. and B.* 1.

In cases of forgery.] Where a party paying money upon a forged instrument has not been guilty of any want of that caution, which in consequence of the character which he fills he is bound to exercise, and has not by his conduct affected the rights of any other parties to the instrument, he may in general recover back the money paid by him, as money paid under a mistake. A person who discounts a forged navy bill, may recover back the money, as money had and received to his use. *Jones v. Ryde*, 5 *Taunt.* 488, 1 *Marsh.* 157, *S. C.* So in the case of forged bank-notes. *Per Gibbs, C. J., ibid.* So where a banker by mistake paid a bill for the honour of a customer whose name was forged, but discovering the mistake gave notice thereof to the holder, in time to enable him to give notice of non-payment to the indorsers, it was held that the money was recoverable from the holder. *Wilkinson v. Johnson*, 3 *B. and C.* 428. And so where the plaintiffs discounted for the defendants a bill of exchange, which the latter did not indorse, and the signatures of the drawer and acceptor (the latter of whom kept an account with the plaintiffs) were forged, it was ruled that the defendants were liable to refund the money. *Fuller v. Smith*, *R. and M.* 49.

But where the party paying the money has the means of knowing, or is bound to know, that the handwriting is forged, or where, by his delay in discovering his mistake, he has deprived the holder of the means of resorting to other parties on the bill, he will not be allowed to recover. Thus where two bills were drawn upon the plaintiff, one of which he accepted, and both of which he paid, and it appeared that the handwriting of the drawer was forged, it was held that it was incumbent upon the plaintiff to be satisfied that the bill drawn upon him was the drawer's hand, before he accepted or paid it, and that he could not recover the amount. *Price v. Neal*, 3 *Burr.* 1354, 1 *W. Bl.* 390, *S. C.*; *see* 3 *B. and C.* 434. So where a banker paid a bill, which purported to be accepted payable at his house by one of his customers, and the forgery of the acceptor's name was not discovered until the end of a week, it was held that the money could not be recovered from

the holder. *Smith v. Mercer*, 6 *Taunt.* 76; *and see* 3 *B. and C.* 435. Where a check, drawn by a customer upon his banker for a sum of money described in the body of the check in words and figures, was afterwards altered by the holder, who substituted a larger sum for that mentioned in the check, but in such a manner that no person in the ordinary course of business could observe it, and the banker paid to the holder this larger sum, it was held that the banker could not charge his customer for anything beyond the sum for which the check was originally drawn. *Hall v. Fuller*, 5 *B. and C.* 750, 8 *D. and R.* 464, *S. C.*

Money paid under a mistake of facts or of law.] Money paid under a mistake of facts, and which the party receiving it has no claim in conscience to retain, is recoverable as money paid without consideration. *See the cases last cited, and Bize v. Dickason*, 1 *T. R.* 285; *Milnes v. Duncan*, 6 *B. and C.* 671. But where money is paid with a knowledge of all the facts, but under a mistake of *the law*, it cannot in general be recovered. *Bilbie v. Lumley*, 2 *East*, 469. *Brisbane v. Dacres*, 5 *Taunt.* 143. *Cartwright v. Rowley*, 2 *Esp.* 723. *Davies v. Watson*, 2 *Nev. and Man.* 709. Where money was paid on account, and a dispute afterwards occurred between the parties, and a balance was struck omitting to notice the sums paid, and the plaintiff paid the whole balance, he was permitted to recover the sum paid on account, as money paid under a mistake of fact in the hurry of business. *Lucas v. Worswick*, 1 *Moo. and Rob.* 293. Where an article is sold, which turns out to be of less value than the price given for it, the extra price, if there be no fraud, cannot be recovered back; *per Le Blanc, J., Cox v. Prentice*, 3 *M. and S.* 349; but where parties agree to abide by the weighing of any article at any particular scales, and in the weighing, an error, not perceived at the time, takes place, from an accidental misreckoning of some weight, and the thing is reported of more weight than it really is, and the price is paid thereupon, money had and received is sustainable. *Per Lord Ellenborough, ibid.* A tenant who has paid rent to his landlord, and has afterwards been ejected by a third person, who sues him for the mesne profits, and recovers for the period during which the tenant has paid his rent, may recover the rent so paid from his landlord in an action for money had and received, the landlord not having set up any title at the trial of the ejectment. *Newsome v. Graham*, 10 *B. and C.* 234. *See* 1 *Freeman*, 479 (*note d*), 2*d ed.* After the death of a bankrupt tenant for life his assignees were allowed to recover, as money had and received, the bygone rents from a person who had received them under the colour of a fraudulent assignment. *Pearce v. Day, cited* 2 *Russ. and Myl.* 124, 481.

As to money had and received on rescinding a contract, *see ante p.* 180, *and p.* 241.

Money obtained by fraud or duress, &c.] Where money has been obtained by fraud or duress, this action lies to recover it; and money fraudulently obtained may be recovered at law, although the defendant may be entitled to it by the ecclesiastical law. *Crockford v. Winter,* 1 *Campb.* 124. So where the defendant married the plaintiff, living his former wife, and received the rents of her land, they were held recoverable in this form of action. *Hasser v. Wallis,* 1 *Salk.* 28. And where the defendant fraudulently colluded with J. S., who was insolvent, to obtain wines from the plaintiff, the proceeds of which eventually came to the defendant's hands, in satisfaction of a debt due to him from J. S., the plaintiff was held entitled to recover in this action. *Abbotts v. Barry,* 2 *B. and B.* 369, 5 *B. Moore,* 98, *S. C.*

So where a man has been compelled by duress to pay money, it may be recovered in this action, as where he has paid an exorbitant sum to redeem his goods from pawn. *Astley v. Reynolds,* 2 *Str.* 915. Where goods not liable to seizure are seized by a revenue officer, who extorts money to release them; *Irving v. Wilson,* 4 *T. R.* 485; where a corporation officer extorts a fee for granting a license; *Morgan v. Palmer,* 2 *B. and C.* 729; where a sheriff claims and receives a larger fee than he is entitled to; *Dew v. Parsons,* 2 *B. and A.* 568; where a toll-keeper exacts an illegal toll; *Parsons v. Blundy, Wightw.* 22; this action is maintainable. But where replevin would be the proper remedy, this action does not lie, as where money has been paid to release goods taken as a distress; *Lindon v. Hooper, Cowp.* 414; and where an action is brought, and the defendant pays the demand "without prejudice," he cannot afterwards recover the money so paid. *Brown v. M'Kinally,* 1 *Esp.* 279. So money recovered by legal process, though in fact not due, cannot be recovered by the defendant in the former action; *Marriott v. Hampton,* 7 *T. R.* 269; *Hamlet v. Richardson,* 9 *Bingh.* 644; but this action lies to recover money in the hands of an overseer, levied on a conviction which has been quashed. *Feltham v. Terry, cited* 1 *T. R.* 387.

In cases of illegal contracts.] Where money has been paid, in pursuance of an illegal contract, it is in certain cases recoverable, as money had and received to the use of the party paying it. It may be recovered in the following cases; *see* 1 *H. Bl.* 65 (*n*), *4th ed.*

1, When the contract remains *executory* though the plaintiff and defendant be *in pari delicto. Tappenden v. Randall,* 2 *B. and P.* 467. *Aubert v. Walsh,* 3 *Taunt.* 277. *Busk v. Walsh,*

4 *Taunt.* 290. *Per Buller, J., Lowry v. Bourdieu, Dougl.* 468. A distinction, however, has been taken between contracts merely illegal, and contracts to perform some act *malum in se*, or grossly immoral, in which case it is said, the courts will not interfere to compel the repayment of the money, even though the contract remains executory; but the distinction between *mala prohibita* and *mala in se* has been frequently denied. *See Farmer v. Russell,* 1 *B. and P.* 298; *Aubert v. Maize,* 2 *B. and P.* 371; *Cannan v. Bryce,* 3 *B. and A.* 179.

2, The money is recoverable from a stakeholder into whose hands it has been paid, upon an illegal consideration *executed* by the happening of the event upon which the wager is made; provided the money has not been paid over by the stakeholder to the other party, or provided the plaintiff has demanded it before it was paid over; or provided that the stakeholder has paid over the money without the authority of the plaintiff. *Cotton v. Thurland,* 5 *T. R.* 405. *Bate v. Cartwright,* 7 *Price,* 540. *Smith v. Bickmore,* 4 *Taunt.* 474; *and see R. and M.* 214 (*n*). *Hastelow v. Jackson,* 8 *B. and C.* 221. *Hodson v. Terrill,* 1 *Crom. and M.* 797.

3, The money is recoverable, though the contract be executed, provided the plaintiff be not *in pari delicto* with the defendant. *Jaques v. Withy,* 1 *H. Bl.* 65. *Williams v. Hedley,* 8 *East,* 378.

4, The agent of a party to an illegal contract, who receives money under it, to the use of his principal, cannot set up the illegality of the transaction, in an action brought against him by his principal. *Tenant v. Elliott,* 1 *B. and P.* 3. *Farmer v. Russell, id.* 296; *but see M'Gregor v. Lowe, R. and M.* 57. The money is *not* recoverable where the contract is *executed*, and the plaintiff is *in pari delicto* with the defendant. *Andree v. Fletcher,* 3 *T. R.* 266. *Howson v. Hancock,* 8 *T. R.* 575. *Vandyck v. Hewitt,* 1 *East,* 96. *Thistlewood v. Cracroft,* 1 *Maule and S.* 500. *Stokes v. Twitchen,* 8 *Taunt.* 492. *Bayntun v. Cattle,* 1 *Moo. and Rob.* 265.

On transfer of debt, by arrangement between three parties.] Where A. was indebted to B. for brokerage, and B. was indebted to C. for money lent, and B. gave an order to A. to pay C. the sum due from A. to B. as a security, on which C. lent B. a further sum, and the order was accepted by A., it was held that on A.'s refusal to comply with the order, C. might maintain an action for money had and received against him. *Israel v. Douglas,* 1 *H. Bl.* 239; *and see Wilson v. Coupland,* 5 *B. and A.* 228. It seems, however, that the agreement must be such, that the debt due from B. to C. is thereby extinguished; *Cuxon v. Chadley,* 3 *B. and C.* 591; *Wharton v. Walker,* 4 *B. and C.* 165; and the debt transferred must also be a demand for money had and received. Thus where A.

being indebted to B. gave him an order upon C., his (A.'s) tenant, to pay the amount out of the next rent that would become due, and B. sent the order to C., but had not any direct communication with him upon the subject, and at the next rent day C. produced the order to A., and promised to pay the amount to B., and upon receiving the difference between that and the whole rent, A. gave a receipt for the whole, it was held that B. could not recover the amount of the order from C., either in an action for money had and received, or upon an account stated. *Wharton v. Walker*, 4 *B. and C.* 163. So where an overseer stopped part of a pauper's allowance, and engaged to pay it to the pauper's landlord for his rent, in pursuance of an understanding between the three, it was held that the landlord could not maintain money had and received against the overseer. *Blackledge v. Harman*, 1 *Moo. and Rob.* 344. Where there is a defined and ascertained debt due from A. to B., and a debt to the same or a larger amount due from C. to A., and the three agree that C. shall be B.'s debtor instead of A., and C. promises to pay B., in an action by the latter against C. it is incumbent on him to show, that at the time when C. promised to pay B. there was an ascertained debt due from A. to B. *Fairlie v. Denton*, 8 *B. and C.* 395; *but see Crowfoot v. Gurney*, 9 *Bingh.* 372. Where the purchaser of an estate agreed with the vendor, that if the latter would pay the whole expense of another transaction, he (the vendor) should not pay any part of the expenses of the conveyance, (which were equally payable by the vendor and vendee), it was held that the money thus set off between the vendor and the vendee, might be recovered by the attorney who prepared the conveyance, as money had and received by the vendee to his use. *Noy v. Reynolds*, 1 *Ad. and Ell.* 159.

In case of partnership.] Where two persons agree to divide the profits of an agency between themselves, and one of them receives, on account of such agency, a certain sum of money, the other cannot maintain this action for a moiety, it being a partnership transaction, and there being no account settled. *Bovell v. Hammond*, 6 *B. and C.* 149, *Bayley dub.*; *see Coffee v. Brian*, 3 *Bingh.* 54, 10 *B. Moore*, 341, *S. C.*

ASSUMPSIT FOR INTEREST.

Great doubts formerly existed with regard to the recovery of interest in certain cases, for the removal of which, provision was made by the 28th and 29th sections of the 3 and 4 W. 4, c. 42, by which it is enacted, that upon all debts or sums certain

payable at a certain time or otherwise, the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law.

And by section 29, it is enacted, that the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure, in all actions of trover or trespass *de bonis asportatis*, and over and above the money recoverable in all actions on policies of assurance made after the passing of this act.

As the above statute only relates to money payable at a certain time, or where a demand has been made in writing, it will be necessary to retain the former decisions on that subject.

The principle upon which interest is claimed is, that it is matter of contract between the parties. "It is now established as a general principle that interest is allowed by law only upon mercantile securities; or in those cases where there has been an express promise to pay interest; or where such promise is to be implied from the usage of trade or other circumstances." *Per Abbott, C. J., Higgins v. Sargent*, 2 *B. and C.* 349.

Many cases were at variance with the rule as above stated, in which interest was allowed on the ground that the money was payable at a day certain. *See Foster v. Weston*, 6 *Bingh.* 714, 4 *M. and P.* 589, *S. C.* Thus it was held that interest was payable on a sum awarded to be paid on a certain day. *Pinhorn v. Tuckington*, 3 *Campb.* 468; *and see Swinford v. Burn*, *Gow*, 9. So in *Chalie v. Duke of York*, 6 *Esp.* 46, which was an action for goods sold and delivered, Lord Ellenborough said, that the mere settling the balance did not entitle the party to interest from that time, nor was he so entitled unless a time was fixed for the payment of the money, from which time only interest could be claimed. *See also Blaney v. Hendricks*, 2 *W. Bl.* 761.

A larger rule than that above-mentioned was laid down by Best, C. J., in *Arnott v. Redfern*, 3 *Bingh.* 359. "However a debt is contracted, if it has been wrongfully withheld by a defendant, after the plaintiff has endeavoured to obtain payment of it, the jury may give interest in the shape of damages

for the unjust detention of the debt." Upon this opinion, Lord Tenterden has observed, that, if adopted as a general rule, it might frequently be made a question at Nisi Prius, whether proper means had been used to obtain payment of the debt, and such as the party ought to have used, which would be productive of much inconvenience. *Page v. Newman*, 9 *B. and C.* 381.

In cases of mercantile instruments.] The mercantile instruments which carry interest are, Bills of Exchange and Promissory Notes. Where the bill or note specifies that interest shall be paid, it is payable from the date; without such words, from the time when the bill or note becomes due. *Kennerley v. Nash*, 1 *Stark.* 452. *Orr v. Churchill*, 1 *H. Bl.* 227. *Doman v. Dibden*, *Ry. and Moo.* 331. Upon a bill or note payable on demand, interest is given from the time of the demand proved. *Blaney v. Hendricks*, 2 *W. Bl.* 761. But where, by the terms of the note, the maker promised to pay legal interest on demand, Lord Ellenborough held that this must mean from the date of the note. *Hopper v. Richmond*, 1 *Stark.* 508. Against the drawer of a bill interest is only recoverable from the time of his receiving notice of dishonour. *Walker v. Barnes*, 5 *Taunt.* 240, 1 *Marsh.* 36, *S. C.*; *see Bayley on bills*, 280. It is said by Bayley, J., that in an action on a bill, as the interest is in the nature of damages, the jury may disallow it in case they are of opinion that the delay of payment has been occasioned by the default of the holder. *Cameron v. Smith*, 2 *B. and A.* 308. By the new statute 3 and 4 W. 4, c. 42, *ante p.* 293, the jury have a discretionary power to give interest.

In case of implied promise.] A promise to pay interest may be implied from the acts of the parties. Thus where a balance has been settled upon an allowance of interest in a banker's book, that is an admission by the party of a contract to pay interest on the sums advanced to him by the banker. *Per Ld. Ellenborough*, *Calton v. Bragg*, 15 *East*, 228. So where the plaintiffs had acted as agents for the defendant, and had advanced monies, and at the close of each yearly account, which was delivered annually, had charged interest, and at each rest had added the interest of the preceding year to the principal, Lord Ellenborough held that the accounts, which had not been objected to for a number of years, afforded sufficient evidence of a promise to pay interest in this manner. *Bruce v. Hunter*, 3 *Campb.* 467. But where compound interest is charged, it must appear that the party knew that the practice was to make such rests. *Moore v. Voughton*, 1 *Stark.* 487; *and see Dawes v. Pinner*, 2 *Campb.* 486 (*n*).

Where interest is not allowed.] The following cases must

now be considered as subject to the provisions of the 3 and 4 W. 4, c. 42, already stated. It was formerly held that interest could not be recovered on money received to the use of another; *De Havelland v. Bowerbank*, 1 *Campb.* 50; though the money was obtained by fraud; *Crockford v. Winter*, 1 *Campb.* 120; nor for money lent, to be repaid, either upon demand, or at a given time; *Calton v. Bragg*, 15 *East*, 224; *Higgins v. Sargent*, 2 *B. and C.* 351; nor where the borrower by a written instrument promised to repay it at a certain time; *Page v. Newman*, 9 *B. and C.* 378; nor on money paid; *Carr v. Edwards*, 3 *Stark.* 132; nor on money due for work and labour; *Trelawney v. Thomas*, 1 *H. Bl.* 303; nor on money due for goods sold and delivered, to be paid for on a certain day; *Gordon v. Swan*, 12 *East*, 419; 2 *Campb.* 429 (*n*), *S. C.*; nor upon a policy of insurance; *Kingston v. M'Intosh*, 1 *Campb.* 518; nor upon a policy of insurance on a life, where the money was payable six months after the proof of the death; *Higgins v. Sargent*, 2 *B. and C.* 348; nor on a single bond; *Hogan v. Page*, 1 *B. and P.* 337; nor on rent; *per Tindal, C. J.*, *Foster, v. Weston*, 6 *Bingh.* 714; nor on an instrument "to pay 1500*l.* to be delivered in goods by three payments of 500*l.* each, at three, five, and seven months." *Foster v. Weston*, 6 *Bingh.* 709. An auctioneer employed to sell an estate, who receives a deposit from the purchaser, is a mere stakeholder, liable to be called upon to pay the money at any time; and therefore, although he make interest by it, he is not liable to pay it to the vendor, on the completion of the contract. *Harrington v. Hoggart*, 1 *B. and Ad.* 577. Where the right to the principal is gone the right to interest is gone also. *Kendrick v. Lomax*, 2 *Crom. and J.* 410.

Where interest was payable on money had and received in consequence of a specific agreement, it was held (before the late statute) that the plaintiff might recover the interest on an *indebitatus* count for interest without declaring on the special agreement. *Hicks v. Mareco*, 5 *C. and P.* 498.

ASSUMPSIT ON AN ACCOUNT STATED.

To recover upon the count, on an account stated, the plaintiff must prove an absolute acknowledgment by the defendant of the plaintiff's claim; a qualified acknowledgment is not sufficient, as, "I would have paid you if you had not removed the grates." *Evans v. Verity*, *R. and M.* 239. And where the plaintiff claimed 40*l.* and the defendant offered 17*l.*, it was held that this was not evidence on the account stated, it being an attempt to purchase peace. *Wayman v. Hilliard*, 4 *Moore and P.* 729, 7 *Bingh.* 101, *S. C.* An entry in a bankrupt's

examination of a certain sum being due to A., is evidence of an account stated between them. *Eicke v. Nokes*, 1 *Moo. and Rob.* 359. Where a party, examined before commissioners of bankrupt, admitted that he had received a sum of money on account of the bankrupt, after an act of bankruptcy, but not that it was a subsisting debt, it was held that this would not support a counton an account stated with the assignees. *Tucker v. Barrow*, 7 *B. and C.* 623. And unless the defendant has admitted the amount of the debt, it must be proved *aliunde*, or the plaintiff will only be entitled to a verdict for nominal damages; *Dickson v. Deveridge*, 2 *C. and P.* 109; *Leeson v. Smith*, 4 *Nev. and M.* 304; and in an action by the plaint ff as executrix, when the defendant, on being applied to by her for the payment of interest, stated that he would bring her some on the following Sunday, it was held that though this was an admission that something was due, still as it did not appear what the nature of the debt was, nor whether it was due to the plaintiff as executrix, or in her own right, nor that it was one for which assumpsit would lie, the plaintiff was not entitled to recover even nominal damages. *Green v. Davies*, 4 *B. and C.* 235. *Bernasconi v. Anderson, M. and M.* 183. *Teal v. Auty*, 2 *B. and B.* 101, 4 *B. Moore*, 452, *S. C.* So it has been ruled by Tindal, C. J., that to recover on an account stated, the plaintiff must show some precise sum. *Kirton v. Wood*, 1 *Moo. and Rob.* 253. It is sufficient to prove the account stated without giving evidence of the several items constituting the account; *Bartlett v. Emery*, 1 *T. R.* 42 (*n*); and proof of one item is sufficient to maintain the count. *Highmore v. Primrose*, 5 *Maule and S.* 65. Where a partnership has been dissolved, and a balance struck between the partners, and there has been a promise to pay such balance, it may be recovered under this count; *Foster v. Allanson*, 2 *T. R.* 479; but such action will only lie on a final balance of the partnership accounts, and not during the continuance of the partnership; *Fromont v. Coupland*, 2 *Bingh.* 170; *Goddard v. Hodges*, 1 *Crom. and M.* 37; *see Wilson v. Cutting*, 10 *Bingh.* 436; nor, as it seems, without an express promise to pay the balance. *Ibid.*; *but see Rackstraw v. Imber*, *Holt*, 368; *Clark v. Glennie*, 3 *Stark.* 10; *Henley v. Soper*, 2 *Mann. and R.* 166, 8 *B. and C.* 20, *S. C.*

The plaintiff may recover on an account stated by the defendant with his (the plaintiff's) wife, but not on an account stated by the wife of the defendant; *B. N. P.* 129; unless she be proved to be the defendant's agent in the transaction, *ante p.* 42. An acknowledgment in a casual conversation with a stranger is not sufficient. *Breckon v. Smith*, 1 *Ad. and Ell.* 488. Where there were accounts between A. and B., and C. became a partner with B., and dealings continued between B. and C. as partners, and A., who afterwards settled an account with B. and C., wherein was included the money due from A. to B.

alone, Lord Kenyon held that the whole might be given in evidence on a count on an account stated, in an action by B. and C. *Moore v. Hill, Peake, Ev.* 273, *4th ed.*; *and see Gough v. Davies*, 4 *Price*, 214; *David v. Ellice*, 5 *B. and C.* 196. An account stated was formerly considered conclusive, but a greater latitude now prevails, in order to remedy the errors which may have crept into the account, in surcharging the items. *Per Lord Mansfield, Trueman v. Hurst*, 1 *T. R.* 42. *But see Roper v. Holland*, 4 *Nev. and M.* 668. If the defendant accounts with the plaintiff in a particular character, he will be taken to have admitted that character. *Peacock v. Harris*, 10 *East*, 104; *see ante p.* 37.

A promissory note, not properly stamped, cannot be given in evidence as an admission by the maker, upon a count on an account stated. *Green v. Davies*, 4 *B. and C.* 235. Nor a note payable on a contingency. *Morgan v. Jones*, 1 *Crom. and Jer.* 162.

A banker's pass-book delivered to his customer, in which there are entries on one side only, is not evidence of a settled account between the parties, although the customer keeps the book without making any objection. *Ex parte Randleson*, 2 *Deacon and C.* 534.

An acknowledgment by a defendant, after action brought, of money being due to the plaintiff, is not evidence of an account stated, there being no proof of previous transactions between the parties. *Allen v. Cook*, 2 *Dowl. P. C.* 546.

By the form of this count the plaintiff cannot give evidence of more than one accounting. It is not like a count for goods sold, which may have been at several different times. *Per Littledale, J., Kennedy v. Withers*, 3 *B. and Ad.* 769.

Where accounts are submitted to an arbitrator, not by bond, his award may be given in evidence under the count on an account stated. *Keen v. Batshore*, 1 *Esp.* 194. And where an incoming tenant agrees to take fixtures at a valuation to be made by two brokers, and such valuation is made and the tenant enters, the value of the fixtures may be recovered under a count on an account stated. *Salmon v. Watson*, 4 *B. Moore*, 73. The offer of a *cognovit* is not an account stated. *Spencer v. Parry*, 4 *Nev. and M.* 770.

DEFENCE IN ASSUMPSIT.

Pleas in Abatement.

Upon issue taken on a plea in abatement, the plaintiff must be prepared to prove the amount of his damages, otherwise, though the issue be found for him, he will only be entitled to nominal damages. *Weleker v. Le Pelletier*, 1 *Campb.* 481.

It has been already stated which party has a right to begin, where issue is joined upon a plea in abatement. *Ante p.* 165.

Plea of nonjoinder of co-contractor.] The following alterations with regard to the pleading the nonjoinder of a co-contractor in abatement have been introduced by the statute 3 and 4 W. 4, c. 42.

By section 8 it is enacted, that no plea in abatement for the nonjoinder of any person as a co-defendant shall be allowed, in any court of common law, unless it shall be stated in such plea that such person is resident within the jurisdiction of the court, and unless the place of residence of such person shall be stated, with convenient certainty, in an affidavit verifying such plea.

By section 9 it is enacted, that to any plea in abatement, in any court of law, of the nonjoinder of another person, the plaintiff may reply that such person has been discharged by bankruptcy and certificate, or under an act for the relief of insolvent debtors.

By section 10 it is enacted, that in all such cases in which, after such plea in abatement, the plaintiff shall, without having proceeded to trial upon an issue thereon, commence another action against the defendant or defendants in the action in which such plea in abatement shall have been pleaded, and the person or persons named in such plea in abatement as joint contractors, if it shall appear by the pleadings in such subsequent action, or on the evidence at the trial thereof, that all the original defendants are liable, but that one or more of the persons named in such plea in abatement, or any subsequent plea in abatement, are not liable as a contracting party or parties, the plaintiff shall nevertheless be entitled to judgment, or to a verdict and judgment, as the case may be, against the other defendant or defendants who shall appear to be liable; and every defendant who is not so liable shall have judgment, and shall be entitled to his costs as against the plaintiff, who shall be allowed the same as costs in the cause against the defendant or defendants who shall have so pleaded in abatement the nonjoinder of such person; provided that any such defendant, who shall have so pleaded in abatement, shall be at liberty on the trial to adduce evidence of the liability of the defendants named by him in such plea in abatement.

Where one of several joint contractors has become bankrupt, the other contractor may plead the nonjoinder in abatement. *Bovill v. Wood*, 2 *Maule and S.* 23. *Hawkins v. Ramsbottom*, 6 *Taunt.* 179. But the plaintiff may now reply the bankruptcy. *Vide supra.*

Where one of several joint contractors is an infant, he ought not to be joined, and if the defendant pleads his nonjoinder in abatement, the plaintiff may reply the infancy of the co-contractor. *Burgess v. Merrill*, 4 *Taunt.* 468. But where in-

stead of replying the infancy, the plaintiff replied that the contract was made by the defendant solely, the court of Common Pleas held that the plea was supported by evidence that the promise was made by the defendant and the infant jointly; on the ground that the contract was not void as to the infant, but voidable only. *Gibbs v. Merrill*, 3 *Taunt.* 307. But it has been said, that a contract by an infant for goods for the purposes of trade is void and not merely voidable. *Per Bayley, J., Thornton v. Illingworth*, 2 *B. and C.* 826.

Where the parties sought to be joined are not general partners, but joint contractors, in the transaction in question, only, evidence must be given to show that the plaintiff knew that he was dealing with all of them. So where the parties are not merely joint contractors, but general partners, though one partner has authority to bind the others in matters relating to the partnership, yet if the contract is made by the defendant alone, and the plaintiff is not aware that he is dealing with the partnership, the nonjoinder cannot be pleaded in abatement. *Mullett v. Hook, M. and M.* 88. *Doo v. Chippenden, Abbott on Shipping*, 76, 5th *ed. Baldney v. Ritchie*, 1 *Stark.* 338; *sed vide Dubois v. Ludert*, 5 *Taunt.* 609. In order, therefore, to support the plea in abatement in such case, it must be shown that the plaintiff knew that he was dealing with the partnership; proof that the transaction took place at the office of the partnership, that the defendant and his partners publicly held themselves forth as partners in such transactions, or that the plaintiff had previous dealings with the partnership, will be evidence in support of the plea. On the other hand, any acts on the part of the defendant from which it can be inferred, that he treated the transactions as several and not joint, will be evidence for the plaintiff. Where, in answer to a plea of nonjoinder, the plaintiff gave in evidence several letters to him from the defendant, in which he promised to pay the money in question, without making any mention of his partners, Lord Ellenborough held the letters conclusive evidence that the debt was due from the defendant individually. *Murray v. Somerville*, 3 *Campb.* 99 (*n*).

There are many cases in which a party entering into a contract in his own name, on behalf of others, may be sued, or those for whom he contracts may be sued. *Per Bayley, J., Hall v. Smith*, 1 *B. and C.* 407. Thus where a promissory note began, "I promise to pay," and was signed "For W. S., W. P. S. &c. William Smith," and William Smith pleaded in abatement the nonjoinder, on which issue was taken, it was held that the issue was rightly found for the plaintiff. *Ibid. see March v. Ward, Peake*, 130. *Clerk v. Blackstock, Holt*, 474.

With regard to the competency of witnesses it has been held that where the plea states that the promises were made

jointly with A. B., the plaintiff may call A. B., since, if the plaintiff recovered he would be liable to contribution, and the record in the action pending would not be evidence for him in an action by the defendant for contribution. *Cossham v. Goldney*, 2 *Stark*. 414. But he is not a competent witness for the defendant, since his evidence would go to discharge himself from contribution, and from his share of the costs. *Hare v. Munn, M. and M.* 241 (*n*). *Evans v. Yeatherd*, 2 *Bingh*. 133 ; *and ante p* 111, 112. But the declarations of the party named in the plea, made before action brought, are admissible for the defendant. *Clay v. Langslow, M. and M.* 45.

Plea of misnomer.] The plea of misnomer is abolished by the statute 3 and 4 W. 4, c. 42, s. 11, by which it is enacted, that no plea in abatement for a misnomer shall be allowed in any personal action, but that in all cases in which a misnomer would, but for this act, have been by law pleadable in abatement, in such action, the defendant shall be at liberty to cause the declaration to be amended, at the costs of the plaintiff, by inserting the right name, upon a judge's summons, founded on an affidavit of the right name; and in case such summons shall be discharged, the costs of such application shall be paid by the party applying, if the judge shall think fit.

Plea of Non assumpsit.

The law with regard to the evidence which may be received under the plea of *non assumpsit* has been most materially altered by the general rules of H. T. 4 W. 4, which are as follows:—

1, In all actions of assumpsit, except on bills of exchange and promissory notes, the plea of *non assumpsit* shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law.

Ex. gr. In an action on a warranty, the plea will operate as a denial of the fact of the warranty having been given upon the alleged consideration, but not of the breach; and in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties.

In actions against carriers and other bailees, for not delivering or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting, the plea will operate as a denial of any express contract to the effect alleged in the declaration, and of such bailment or employment as would raise a promise in law to the effect alleged, but not of the breach.

In an action of *indebitatus assumpsit*, for goods sold and de-

livered, the plea of *non assumpsit* will operate as a denial of the sale and delivery in point of fact; in the like action for money had and received, it will operate as a denial both of the receipt of the money and the existence of those facts which makes such receipt by the defendant a receipt to the use of the plaintiff.

2, In all actions upon bills of exchange and promissory notes, the plea of *non assumpsit* shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact, *ex. gr.* the drawing or making, or indorsing, or accepting or presenting, or notice of dishonour of the bill or note.

3, In every species of assumpsit, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded; *ex. gr.* infancy, coverture, release, payment, performance, illegality of consideration, either by statute or common law, drawing, indorsing, accepting, &c. bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences must be pleaded.

4, In actions on policies of assurance the interest of the assured may be averred thus:—

"That A., B., C., and D., or some or one of them, were or was interested, &c." And it may also be averred, "that the insurance was made for the use and benefit, and on the account of the person or persons so interested."

Few decisions have as yet occurred with regard to the interpretation of these rules. In one case, Lord Denman, C. J., ruled that in an action of *indebitatus assumpsit* for goods sold and delivered, the defendant was not at liberty, under *non assumpsit*, to show that the goods were of no value. *Roffey v. Smith*, 6 *C. and P.* 662. *Sed vide*, *p.* 277. The authority of this decision may perhaps be doubted. By this rule the general issue operates as a denial of "the matters of fact from which the contract or promise alleged may be implied by law," and in this case the "matters of fact," appear to have been such as to raise no implication of a promise in law. Where in an action upon a special contract, the defendant offered to give in evidence under the plea of *non assumpsit* the want of consideration, it was held that this could not be allowed. *Passenger v. Brookes*, 1 *Bingh. N. C.* 587.

With regard to pleading specially in case of void and illegal contracts, it has been held in assumpsit for not completing the sale of a house, that the defendant cannot, under the general issue, show that the sale was void in consequence of *puffing*. *Icely v. Grew*, 6 *C. and P.* 671. So in assumpsit for work and labour done, if the defence be the illegality of the work

and labour it must be specially pleaded. *Potts v. Sparrow*, 3 *Dowl. P. C.* 630, 1 *Bingh. N. C.* 594, *S. C.* So where a contract is made void by statute, as where the defence is that an assignment of copyright is not in writing as required by the statutes 9 Ann, and 3 and 4 W. 4, c. 15, that defence cannot be given in evidence under *non assumpsit*. *Barnett v. Glossop*, 3 *Dowl. P. C.* 625, 1 *Bingh. N. C.* 633, *S. C.*

Where the plaintiffs declare upon a special agreement, it has been held that the defence of want of consideration cannot be given in evidence under the general issue, but must be specially pleaded. *Passenger v. Brookes*, 1 *Bingh. N. C.* 587.

As to the necessity of pleading specially that the action has been brought before the credit has expired, *vide ante p.* 277.

Part payment may, as it seems, be given in evidence under *non assumpsit*. *See Shirley v. Jacobs*, 4 *Dowl P. C.* 137.

Accord and Satisfaction.

Accord and satisfaction might formerly have been given in evidence under the general issue; *Paramour v. Johnson*, 12 *Mod.* 377; but must now be specially pleaded. Accord and satisfaction by one defendant is a bar for all. *Com. Dig. Accord*, *A.* (1). The defendant must prove the accord executed (if denied); therefore, where there is an agreement to pay money in satisfaction, it is not good to show that he has always been ready to pay it, or a tender and refusal. *Id.* (*B.* 4). *Peytoe's case*, 9 *Rep.* 79 *b*; *but see Bradley v. Gregory*, 2 *Campb.* 385, *post.* So, though an accord to do a thing at a future day is good, yet it must be proved to be executed before action brought. 1 *Rol. Ab.* 129, *l.* 17.

It must appear to be a reasonable satisfaction, and therefore acceptance of a less sum cannot be a satisfaction in law of a greater sum then due; *Fitch v. Sutton*, 5 *East*, 230; but where a debtor entered into an agreement with his creditors (though not under seal) whereby they agreed to receive a certain sum per cent. in satisfaction of their demands, and released the remainder, in consideration that half the composition should be secured by the acceptances of a certain person (also a creditor), which security was given, and paid when due, it was held that this was a sufficient accord and satisfaction executed, and that a creditor who had received it could not afterwards sue the debtor, for to do so would be a fraud upon the surety. *Steinman v. Magnus*, 11 *East*, 390; *see Lewis v. Jones*, 4 *B. and C.* 513. So where all the creditors of a man sign an agreement to give him time for the payment of their respective debts by instalments, and to take promissory notes for the amount, such agreement is binding upon each, the signing by the others being a sufficient consideration, and they cannot sue for the original debt. *Boothby v. Sowden*, 3 *Campb.* 175; *see also Wood v. Roberts*, 2 *Stark*, 417. But to operate as a satisfaction, the composition must be paid; and

therefore where the plaintiff had agreed with the defendant and the rest of the defendant's creditors to take a composition secured by the defendant's notes, and on defendant assigning certain debts to the creditors, to execute a general release, and all the other creditors accepted the composition and executed the release, it was held that the plaintiff, although he might have received his notes had he applied for them, not having received them, might sue on his original demand, no tender of the notes having been made. *Cranley v. Hillary*, 2 *Maule and S.* 120; *and see Walker v. Seaborne*, 1 *Taunt.* 526. So where the debtor, in a composition with his creditors, stipulated that "the notes should be given within fourteen days, the creditors assenting thereto within that time:" a creditor to whom the notes had not been tendered within fourteen days was allowed to recover the whole amount against A. *Oughton v. Trotter*, 2 *Nev. and M.* 71. But had the notes been tendered, it would, as it seems, have been sufficient. Thus, where the defendant's creditors agreed to take a composition on their respective debts, to be secured partly by the acceptances of a third person, and partly by the defendant's own notes, and to execute a composition deed containing a clause of release, it was held by Lord Ellenborough that a creditor who had come in under the agreement, and to whom the acceptances and notes were regularly tendered, but who had refused to execute the composition deed after it had been executed by all the other creditors, could not sue for his original debt. *Bradley v. Gregory*, 2 *Campb.* 383; *but see Peytoe's case*, 9 *Rep.* 79 *b. supra; see also Butler v. Rhodes*, 1 *Esp.* 236. And where creditors agreed to accept payment by the debtor covenanting to pay to a trustee of their nomination a third of his annual income, and executing a warrant of attorney as a collateral security, and the creditors never nominated a trustee, and the agreement not being acted upon; in an action by one of the creditors, it was held that the agreement, though not properly an accord and satisfaction, was a good defence under the general issue, it being a new agreement with the defendant, the consideration of which to the creditor, was a forbearance by all the other creditors. *Good v. Cheesman*, 2 *B. and Adol.* 329. In the following case the literal performance of the stipulations in the composition deed was dispensed with. A. being insolvent, by agreement stipulated to assign his property immediately, the creditors consenting that the business should be carried on for their benefit until the next Michaelmas, and that then the property should be divided amongst them; and the insolvent accordingly assigned his effects. At the next Michaelmas several of the creditors, who had signed the instrument, agreed that the business should be carried on by the trustees for a further time. It was held that a creditor, who had signed the first agreement, but who had not in any way con-

curred in the second, could not maintain an action against the insolvent for a debt existing at the time of the first agreement. *Cork v. Saunders*, 1 *B. and A.* 46. In an action against the defendants as acceptors of a bill of exchange for 1039*l.* it appeared that the defendants owed the plaintiffs a balance of 321*l.*; that the defendants failed; and their creditors, amongst whom were the plaintiffs, agreed to take a composition of 5*s.* in the pound on their debts, by notes at four and eight months. There was a dispute as to the balance due to the plaintiffs, and they promised to adjust their account with one of the defendants, and said they would do as the other creditors did. The defendants insisted for some time that 250*l.* 9*s.* 7*d.* was the balance due; but the defendants' attorney afterwards called on the plaintiffs' attorney, and told him that the defendants were ready to pay the composition on 321*l.*, the sum really due, but the plaintiffs' attorney refused, and said they must have the whole. No actual tender was made of the notes, or of cash for the amount of the composition. It was held that a tender was not necessary under the circumstances, and that the plaintiffs could only recover the amount of the composition on the balance. *Reay v. White*, 1 *Crom. and M.* 748. Where the creditor, by the act of the debtor, is prevented from taking the benefit of the composition, he is remitted to his right to sue. Thus where the plaintiff and other creditors of the defendants signed resolutions for entering into a composition deed with the defendants, upon an assignment of their property to trustees, and the defendants and their trustees refused to allow the plaintiff to come in as a creditor under the deed, it was held that he might sue the defendants. *Garrard v. Woolner*, 8 *Bingh.* 258. So if it appear that there has been a wilful withholding by the debtor of information respecting his estate, it will avoid the composition and remit the creditor to his right to sue for the whole. *Vine v. Mitchell*, 1 *Moo. and Rob.* 337.

Coverture.

The coverture of the defendant at the time of the contract entered into was formerly a good defence under the general issue, but must now be pleaded specially. In some cases a married woman has been allowed to be sued as a feme sole. If the wife of a foreigner, resident abroad, live and trade here as a feme sole, she may be sued as such. *De Gaillon v. L'Aigle*, 1 *B. and P.* 357. And where a French emigrant left his wife in this country, and resided himself abroad, Lord Kenyon held that this was tantamount to an abjuration of the realm in a native, and that the wife might be sued as a feme sole. *Walford v. Duchess de Pienne*, 2 *Esp.* 554. *Francks v. Same*, *Id.* 587. But in a similar case Lord Ellenborough held that the wife was not so liable, and the court of King's Bench concurred in

that opinion. *Kay v. Duchess de Pienne*, 3 *Campb.* 123. A feme covert living apart from her husband, and having a separate and sufficient maintenance, cannot be sued as a feme sole. *Marshall v. Rutton*, 8 *T. R.* 545, Nor can the wife of an Englishman who is resident abroad be so sued. *Marsh v. Hutchinson*, 2 *B. and P.* 226. *Stretton v. Busnach*, 1 *Bingh. N.C.* 139; *and see Boggett v. Frier*, 11 *East*, 301. Even a divorce *a mensâ et thoro* for adultery does not so far destroy the relation of husband and wife as to render the latter liable as a feme sole. *Lewis v. Lee*, 3 *B. and C.* 291. But after a divorce *ab initio* the wife becomes a single woman by operation of law, and it is the same as if she had always remained single. *Anstey v. Manners*, *Gow*, 11. And so where the husband has abjured the realm; *Lean v. Schutz*, 2 *W. Bl.* 1199, 4 *B. and C.* 297; or been transported for a limited period, in which case the wife is to be considered as a feme sole. *Carrol v. Blencow*, 4 *Esp.* 27; *see* 2 *B. and P.* 233.

Where coverture is the defence, the defendant may prove her marriage by a copy of the register, with proof of identity, *ante p.* 79; or by the usual presumptive evidence of marriage, reputation and cohabitation. *Leader v. Barry*, 1 *Esp.* 353. *Kay v. Duchess of Pienne*, 3 *Campb.* 123. *Birt v. Barlow*, 1 *Dougl.* 171. And she must show that her husband was living at the time of the debt contracted. If she shows him to have been alive within seven years it will be sufficient. *Hopewell v. De Pinna*, 2 *Campb.* 113, *ante p.* 22. Acknowledgments by the defendant, and the person whom she alleges to be the husband, of their marriage, without actual proof of the marriage, or of reputation of marriage, are insufficient to prove the coverture. *Wilson v. Mitchel*, 3 *Campb.* 394.

Fraud.

The proof of fraud in the party seeking to enforce a contract is a good defence, but, by the new rules, it must be specially pleaded. Where the defendant erroneously supposed that a picture had been in the possession of Sir F. Agar, and purchased it from the agent of the plaintiff, who was aware of the error, but did not undeceive the defendant, Lord Ellenborough held that the plaintiff could not recover the sum for which the picture was sold. *Hill v. Gray*, 1 *Stark.* 434. So where goods are falsely described as "the property of a gentleman deceased." *Per Lord Mansfield*, *Bexwell v. Christie*, *Cowp.* 395. So where, at a sale by auction, the owner of the goods employs a person to bid for him, and the buyer has no notice of such appointment, it is a fraud, and the seller cannot recover the price. *Crowder v. Austin*, 3 *Bingh.* 368, 2 *C. and P.* 210, *S. C.* *Wheeler v. Collier*, *M. and M.* 126. *vide ante p.* 178.

Illegality.

Where a contract is illegal or immoral, it cannot be enforced, and proof of its illegal or immoral nature will be a defence to the action, but such defence must be specially pleaded. *Potts v. Sparrow,* 3 *Dowl. P. C.* 680, 1 *Bingh. N. C.* 594, *S. C.* Thus, if goods are sold to be applied to an illegal purpose, with the knowledge of the vendor, an action cannot be maintained, as in the case of brewers' drugs. *Langton v. Hughes,* 1 *Maule and S.* 593. So in the case of bricks under the statutable size. *Law v. Hodson,* 11 *East,* 300.

So in an action for work and labour, the illegality of the transaction will be a defence. A party will not be permitted to sue either for work and labour done, or materials provided, where the whole combined forms one entire subject-matter, made in violation of the provisions of an act of parliament. *Bensley v. Bignold,* 5 *B. and A.* 335. Thus a printer who makes a false affidavit that he is sole proprietor of a paper, cannot sue the real proprietors for the printing, or for any matter connected with its circulation. *Stephens v. Robinson,* 2 *Crom. and J.* 209 ; *see stat.* 38 *G.* 3, *c.* 78, *s.* 2. And the proprietor of a newspaper cannot, before the filing of the affidavit directed by the statute, recover upon a contract for the printing of the paper. *Houstoun v. Mills,* 1 *Moo. and Rob.* 325. So the printer of an immoral and libellous book cannot maintain an action for his bill against the publisher who employed him. *Poplet v. Stockdale, R. and M.* 337 ; *and see Coates v. Hatton,* 3 *Stark.* 61. So a person who has expended money for the purposes of an unlicensed theatre cannot recover against another, at whose request he expended the money, and who participated in the profits. *De Begnis v. Annislead,* 10 *Bingh.* 107, 5 *Moore and S.* 519, *S. C.* So money deposited with an agent and expended by him in illegal disbursements, cannot be recovered from him by his principal, if the principal was at the time aware of the illegal disbursements, or assented to them. Payment by a candidate at an election for members of parliament, of the expenses of taking up the freedom of his voters, is illegal. *Semble,* it is also illegal to pay the travelling expenses of voters. *Bayntun v. Cattle,* 1 *Moo. and Rob.* 265.

But where the party seeking to enforce the contract has been guilty of contravening a law made, not for the protection of the public, but of the revenue only, this is not such an illegality as will prevent him from recovering at law. *Brown v. Duncan,* 10 *B. and C.* 93 ; *and see Hodson v. Temple,* 5 *Taunt.* 181 ; *Johnson v. Hudgson,* 11 *East,* 180 ; *Wetherell v. Jones,* 3 *B. and Ad.* 221.

The Treating Act, 7 and 8 W. 3, c. 4, only applies to candidates and their agents. *Hughes v. Marshall.* 5 *C. and P.* 150.

A brewer, delivering beer to a person not the licensed keeper of the public house where it is delivered, may maintain an action against him for the price. *Brooker v. Wood*, 5 *B. and Ad.* 1052.

Illegality.—Sale of spirituous liquors.—Drunkenness.] By statute 24 G. 2, c. 40, s. 12, "No person or persons whatsoever shall be entitled unto, or maintain an action, cause, or suit for, or recover, either in law or equity, any sum or sums of money, debt or demand whatsoever, for or on account of any spirituous liquors, unless such debt shall have really been and *bonâ fide* contracted at one time to the amount of twenty shillings or upwards; nor shall any particular article or item in any account or demand for distilled spirituous liquors be allowed or maintained, where the liquors delivered at one time, and mentioned in such article or item, shall not amount to the full value of twenty shillings at the least, and that without fraud or covin, and where no part of the liquors so sold or delivered shall have been returned, or agreed to be returned, directly or indirectly." This statute does not extend to the case of a person who purchases liquors in small quantities to retail them again, as the keeper of an eating house. *Jackson v. Attrill, Peake*, 180 *a*. *Gilpin v. Rundle*, 1 *Selw. N. P.* 61, *4th ed.* But it applies to the case of a tavern keeper's bill which the defendant has contracted, and in which there are items for spirits supplied to the defendant's guests. *Burnyeat v. Hutchinson*, 5 *B. and A.* 241. And a bill of exchange, part of the consideration of which is for spirituous liquors sold in less quantities than twenty shillings, is wholly void. *Scott v. Gillmore*, 3 *Taunt.* 226. *Gaitskill v. Greathead*, 1 *D. and R.* 359. But where a bill had been accepted by an officer, in payment of small quantities of spirits under twenty shillings, supplied for recruits and others under the defendant's command, Lord Ellenborough was of opinion that the bill was not invalid. *Spencer v. Smith*, 3 *Campb.* 9.

Drunkenness being a punishable offence, a publican cannot recover for beer furnished to third persons by order of the defendant, if the defendant has previously become intoxicated by drinking in his house. *Brandon v. Old*, 3 *C. and P.* 440.

Illegality—Sunday.] By 29 C. 2, c. 7, s. 1, no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary callings, upon the Lord's-day, or any part thereof, (works of necessity and charity alone excepted). Upon this statute it has been held that a horse-dealer cannot maintain an action upon a contract for the sale and warranty of a horse made by him upon a Sunday. *Fennel v. Ridler*, 5 *B. and C.* 408. But where A., not knowing that B. was a horse dealer, made a verbal bargain with him on a Sunday for the purchase

of a horse, and the price which was above 10*l.* was then specified, and the horse warranted, but it was not delivered till the following Tuesday, when the money was paid, it was held that there was no complete contract till the delivery of the horse, and consequently that the contract was not void under the statute. *Bloxsome v. Williams,* 3 *B. and C.* 232. Though the contract was made by an agent, and the objection is taken by the party at whose request it was entered into on the Sunday, it cannot be enforced. *Smith v. Sparrow,* 4 *Bingh.* 84. But where goods were bought on a Sunday, and the purchaser afterwards, while the goods were in his possession, made a promise to pay for them, it was held that the seller was entitled to recover on a *quantum meruit. Williams v. Paul,* 6 *Bingh.* 653, 4 *Moore and P.* 532, *S. C.* The statute does not make every work or business done on the Lord's-day illegal, the object of the act being to prevent persons carrying on their trade and ordinary occupations and callings on the Lord's-day. Therefore the hiring of a servant by a farmer on a Sunday is good. *R. v. Whitnash,* 7 *B. and C.* 596; *see also Begbie v. Levi,* 1 *Crom. and Jer.* 180.

Immorality.

One who is party to an immoral contract cannot enforce it. Thus the price of obscene and libellous prints cannot be recovered. *Fores v. Johnes,* 4 *Esp.* 97. So an action for use and occupation will not lie if the plaintiff knew that the premises were to be occupied for the purpose of prostitution. *Jennings v. Throgmorton, R. and M.* 251. *ante p.* 190. And where an action was brought against the defendant for board and lodging, and it appeared that she was a prostitute, and had boarded and lodged with the plaintiff who kept a house of ill-fame, and who, besides what she received for the board and lodging of the defendant, partook of the profits of her prostitution, Lord Kenyon was of opinion, that such a demand could not be heard in a court of justice. *Howard v. Hodges, Selw. N. P.* 67, 4*th ed.* But a person may recover the amount of goods sold to a prostitute, unless he expects to be paid out of the profits of her prostitution, and sells her the clothes to enable her to carry it on. *Bowry v. Bennett,* 1 *Campb.* 348. So where the plaintiff was employed to wash clothes for a prostitute, and knew her to be such, and the clothes consisted principally of expensive dresses, and some gentlemens' night-caps, it was held that he was entitled to recover. *Lloyd v. Johnson,* 1 *B. and P.* 340.

Insolvency.

Discharge under the insolvent act.] By the general insolvent act 7 G. 4, c. 57, s. 76, a copy of the petition, schedule, order, and other orders and proceedings under the act, purporting to be signed by the officer in whose custody the

same shall be, or his deputy, certifying the same to be a true copy of such petition, schedule, order, or other proceeding, and sealed with the seal of the insolvent court, shall, at all times, be admitted in all courts whatever, and before commissioners of bankrupts, and justices of the peace, as sufficient evidence of the same, without any proof whatever given of the same, further than that the same is sealed with the seal of the said court as aforesaid. Proceedings which have taken place under the 1 G. 4, c. 119, may be proved in the manner directed by the 7 G. 4, c. 57, c. 76. *Doe v. Evans*, 1 *Crom. and M.* 450. The power given by this clause of offering a certified copy in evidence does not take away the right of the party to give the original order of adjudication in evidence. *Northam v. Latouche*, 4 *C. and P.* 143. Where a defendant pleads that he was discharged under the above act, and the replication denies that such discharge took place, the defendant need not prove the filing of the petition. *Andrews v. Pledger*, 4 *C. and P.* 274, *M. and M.* 508, *S. C.* The only evidence which appears to be necessary under the plea of discharge is, the copy of schedule to show that the defendant is discharged from the debt in question, and the copy of the adjudication to prove the actual discharge.

Under the former insolvent act, 53 G. 3, c. 102, s. 10, it was held than an order made by the insolvent court for the discharge, and delivered to the gaoler in whose custody the prisoner was, was evidence of the discharge. *Neal v. Isaacs*, 4 *B. and C.* 335, 6 *D. and R.* 484, *S. C.* By 7 G. 4, c. 57, s. 54, the court is directed to issue a warrant to the gaoler for the discharge.

Infancy.

That the defendant was an infant at the time of the contract made, is a good defence (unless the action be for necessaries), and by the new rules this defence must be specially pleaded. Where the action, though in form *ex contractu*, is in fact founded upon the *tort* of the defendant, his infancy will be no defence. Thus an action for money had and received will lie against an infant for money which he has embezzled. *Bristow v. Eastman*, 1 *Esp.* 172.

What are necessaries.] An infant may bind himself for necessaries, that is, for meat, drink, apparel, medicines, and similar necessaries, and also for his good teaching, or instruction. *Co. Litt.* 172, *a. Com. Dig. Enfant*, (*B.* 5). The question of necessaries is a relative fact, to be governed by the fortune and circumstances of the infant, and the proof of those circumstances lies on the plaintiff. *Per Lord Kenyon, Ford v. Fothergill*, 1 *Esp.* 211 Whether *necessaries* or not is a mixed question of law and fact. *Maddox v. Miller*, 1 *Maule and S.*

738. An infant, being a captain in the army, is liable for a livery ordered by him for his servant, though not for cockades for the soldiers of his company. *Hands v. Slaney*, 8 *T. R.* 578; *and see Coates v. Wilson*, 5 *Esp.* 152. So an infant may bind himself to pay a fine due upon his admission to a copyhold estate. *Evelyn v. Chichester*, 3 *Burr.* 1717. So for necessaries supplied to his wife. *Turner v. Trisby*, 1 *Str.* 168. *B. N. P.* 155. So for money advanced in order to liberate him when taken in execution for necessaries. *Clarke v. Leslie*, 5 *Esp.* 28.

What are not necessaries.] Although an infant may enter into a partnership, yet he will not be liable for the contracts of the partnership entered into during his infancy, but he will be liable upon such contracts entered into subsequently to his attaining his full age, unless he notifies his disaffirmance of the partnership. *Goode v. Harrison*, 5 *B. and A.* 147. It is the duty of a tradesman dealing with an infant to make inquiries from the parents, for if the infant is supplied with necessaries by them, the tradesman cannot recover for those which he has furnished. *Cook v. Deaton*, 3 *C. and P.* 114. A tailor who supplies an infant with clothes cannot recover for more than are necessary in the then actual state of his wardrobe, and if the infant has ordered clothes from other tailors, evidence of that fact is admissible to show the state of his wardrobe. *Burkhart v. Angerstein*, 6 *C. and P.* 690. An infant is not liable upon an account stated, even though it appears to be for necessaries; nor can the account stated be used as evidence by way of admission on the part of the defendant to show that necessaries have been supplied to that amount. *Ingledew v. Douglas*, 2 *Stark.* 36. Nor on a bill of exchange, though given for necessaries. *Williamson v. Watts*, 1 *Campb.* 552. But he will be liable on a bill accepted after twenty-one, though drawn before. *Stevens v. Jackson*, 4 *Campb.* 164. However, where goods are delivered to a carrier for an infant, the infant cannot be charged, though the goods do not reach him till after he is of age, for the property vests on the delivery to the carrier. *Griffin v. Langfield*, 3 *Campb.* 254. An infant cannot be sued on a warranty of a horse. *Howlett v. Haswell*, 4 *Campb.* 118. When an infant lives with his parent, who provides such apparel as appears to the parent to be proper, so that the child is not left destitute of clothes or other real necessaries of life, it seems that the child cannot bind himself to a stranger, even for what might otherwise be allowed as necessaries. *Per Gould, J., Bainbridge v. Pickering*, 2 *W. Bl.* 1325. And it is incumbent upon a tradesman, before he trusts an infant with necessaries, to inquire whether he is provided by his friends. *Ford v. Fothergill, Peake*

229, 1 *Esp.* 211, *S. C.* An infant is not liable for money lent, though it has been laid out in necessaries. *Darby v. Boucher*, 1 *Salk.* 279. *Probart v. Knouth*, 2 *Esp.* 472 (*n*). It has been held that an infant, a lieutenant in the navy, is not liable for the price of a chronometer, he being out of employment at the time of its being furnished. *Berolles v. Ramsay*, *Holt*, 77.

Ratification after full age.] If infancy is pleaded, the plaintiff may reply, that the defendant ratified and confirmed the contract after he attained the age of twenty-one, and before action brought. *Thornton v. Illingworth*, 2 *B. and C.* 824. A bare acknowledgment, or part payment, after age, will not be sufficient, there must be an express promise; *Thrupp v. Fielder*, 2 *Esp.* 628; and such promise must be voluntary. *Harmer v. Killing*, 5 *Esp.* 102. A contract made by an infant, for goods for the purposes of trade, is absolutely void, not voidable only. The law considers it against good policy, that he should be allowed to bind himself by such contracts. If he makes a promise after he comes of age, that binds him, on the ground of his taking upon himself a new liability upon a moral consideration existing before, it does not make it a legal debt from the time of making the bargain; *per Bayley, J.*, *Thornton v. Illingworth*, 2 *B. and C.* 826; the defendant therefore will not be bound beyond the extent of his new promise, as when he promises to pay half-a-crown in the pound on the whole debt, he is not liable beyond that sum. *Green v. Parker*, 1 *Esp. Dig.* 198, *Peake, Ev.* 297, &c. By Lord Tenterden's Act, 9 Geo. 4, c. 14, s. 5, no action shall be maintained whereby to charge any person, upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age, of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing, to be signed by the party to be charged therewith.

Where the defendant pleads infancy, and the plaintiff replies a ratification of the promises, &c. after twenty-one, the plaintiff need only in the first instance prove a promise, and it lies upon the defendant to prove his infancy, as it is a fact peculiarly within his own knowledge; *Borthwick v. Carruthers*, 1 *T. R.* 648; but if the plaintiff, to the plea of infancy, replies that the goods were necessaries, the defendant need not prove his infancy, but the plaintiff must in the first instance show that the goods were necessaries.

Infancy may be proved by calling any person who can speak to the time of the defendant's birth; or by declarations of deceased members of his family, mentioning the time of his birth, with proof of identity, *ante p.* 26. The register of his *baptism*

is not of itself evidence of the time of his birth, *ante p.* 141. But the register of *birth*, with proof of identity, is good evidence. *Leader v. Barry*, 1 *Esp.* 354.

Insanity.

It is a good defence that the defendant at the time of the contract entered into was of unsound mind, and that the plaintiff took advantage of that circumstance to impose upon him. *Browne v. Joddrell, M. and M.* 105. *Levy v. Baker, id.* 106 (*n*). *Sentance v. Poole,* 3 *C. and P.* 1.

Payment.

Payment cannot now be given in evidence under the general issue, but must be specially pleaded by the rules of H. T. 4 W. 4. But if the payment be admitted in the particulars of the plaintiff's demand it need not be pleaded. *Per Parke, B., Coates v. Stevens,* 2 *Crom. M. and R.* 119. Where the defence is payment, an admission by the plaintiff that nothing is due cannot be given in evidence under the general issue. *Linley v. Polden,* 3 *Dowl. P. C.* 780. Where the parties settle the action before trial, the plaintiff's attorney cannot proceed to trial for his costs, unless he can establish collusion. *Nelson v. Wilson,* 6 *Bingh.* 568. Part payment may be given in evidence, *in reduction of damages,* on a plea of non-acceptance in an action on a bill of exchange. *Shirley v. Jacobs,* 4 *Dowl. P. C.* 136.

To whom and how.] Payment to an authorised agent is sufficient. *See Goodland v. Blewith,* 1 *Camph.* 477; *Coates v. Lewes, id.* 444; *Owen v. Barrow,* 1 *Bos. and Pul. N. R.* 101. Thus payment to an attorney, while an action is subsisting, is good, but otherwise to his clerk, who shows no other authority than his master's order to receive it. *Per Lord Kenyon, Coore v. Callaway,* 1 *Esp.* 115. So payment to the attorney's agent is not good. *Yates v. Frecleton, Dougl.* 623. But payment to a person found in a merchant's counting-house, and appearing to be intrusted with the conduct of the business there, is a good payment to the merchant, though the person was in fact never employed by him. *Barrett v. Deere, M. and M.* 200; *and see Wilmott v. Smith, id.* 238, *post.* In a late case Littledale, J., expressed an opinion that an agent employed to sell has no authority, as such, to receive payment. *Mynn v. Joliffe,* 1 *Moo. and Rob.* 326.

An agent, authorised to receive money, has no power to set-off a debt due from himself to the debtor. *Bartlett v. Pentland,* 10 *B. and C.* 760. Where a creditor directs his debtor to transmit money by the post, and it is lost, the creditor must bear the loss; *Warwicke v. Noakes, Peake,* 67, *a*; and where no directions are given about the mode of remittance, yet this being done in the usual way of transacting business,

it seems that the debtor is discharged. *Per Lord Kenyon, ibid.* It has been ruled that if the letter is delivered to the bellman in the street, and is lost, it is no payment. *Hawkins v. Rutt, Peake,* 186. But this decision appears to be overruled by *Park v. Alexander,* 3 *Moore and S.* 789.

Payment by an attorney to a creditor will support an averment of payment by the principal, though the latter has not repaid his attorney, but has only given him a promissory note. *Adams v. Dansey,* 6 *Bingh.* 506. A payment to one of several persons not partners (without the authority of the others) who have deposited money in a bank, is not good as against the others. *Innes v. Stephenson,* 1 *Moo. and Rob.* 145. *Stewart v. Lee, M. and M.* 158.

Application of payments.] In general the party who pays money has a right to direct the application of it, but where money is paid to a creditor generally, without any specific appropriation by the party paying, and the creditor has several demands against the party paying, he may apply the money paid to which of those demands he pleases. *Hall v. Wood,* 14 *East,* 243 (*n*). *Clayton's case,* 1 *Merivale,* 572. The creditor need not apply it to any particular demand at the moment of payment, but has a right to make the application at a subsequent period; nor will an entry in his books, applying it to a particular demand, but not communicated to the party paying, preclude him from applying it afterwards to another demand. *Simson v. Ingham,* 2 *B. and C.* 65. The creditor may apply the payment to the discharge of a prior and purely equitable demand, and sue his debtor at law for the subsequent legal debt. *Bosanquet v. Wray,* 6 *Taunt.* 597; *but see Birch v. Tebbutt,* 2 *Stark.* 74. So where the party paying is indebted to the party receiving for a sum due from his wife, *dum sola,* and also on another demand, the party receiving may apply the money to the first demand. *Goddard v. Cox,* 2 *Str.* 1194. A., a solicitor in the country, received from a client a sum of money, which was to be paid by him into the Court of Chancery on the client's account. A. obtained a bill for the sum from a country banker, and remitted it to his bankers in London, without stating the reason for which the amount had been paid to him. At the same time he was indebted to his bankers in 450*l.*, for which they held securities, and as to which they kept an account, separate from his general amount. A. died, and a few days afterwards the bill became due, and was paid, and the bankers carried the account to A.'s general account. The bankers, for some time after they had received notice from the client of the circumstances under which the amount of the bill had been paid to A., continued to keep the accounts separate, but ultimately they deducted the 450*l.* from the proceeds of the bill, and paid the balance to his executrix. It was held, that, as there was no agreement, binding the bankers

to keep separate accounts as to the 450*l.*, and the amount of the bill, and as they had no notice, till after the amount was received, of the purpose for which it was intended to be applied, the client was not entitled to recover from them any part of the proceeds of the bill. *Grigg v. Cocks*, 4 *Simons*, 438.

But in some instances the law will direct the application of money paid generally. Thus where one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and new firm in one entire account, the payments made from time to time by the surviving partners must be applied to the old debt. *Per Bayley, J., Simson v. Ingham*, 2 *B. and C.* 72. *Clayton's case*, 1 *Meriv.* 572. *Brooke v. Enderby*, 2 *B. and B.* 71. So payments by a debtor to surviving partners from time to time, upon one general account including the whole debt, are to be applied in the first place to such old debt; *Bodenham v. Purchas*, 2 *B. and A.* 39; but where the old debt is not brought into the new account, general payments on the new account are not to be considered as made in discharge of the old debt. *Simson v Ingham*, 2 *B. and C.* 65. And where there are distinct demands, one against persons in partnership, and another against one only of the partners, if the money paid be the money of the partners, the creditor is not at liberty to apply it to the debt of the individual. *Thompson v. Brown*, *M. and M.* 40. Where payments are made upon one entire account, they are to be considered as payments in discharge of the earlier items. *Per Bayley, J., Bodenham v. Purchas*, 2 *B. and A.* 46. *Williams v. Rawlinson*, 3 *Bingh.* 76. So a general payment must be applied to a prior legal, and not to a subsequent equitable demand. *Goddard v. Hodges*, 1 *Crom. and M.* 33. Where security had been given by a surety for goods to be supplied to his principal, and not in respect of a previously existing debt, and payments were made from time to time by the principal, in respect of some of which discount had been allowed for prompt payment (the goods having been sold on credit), it was held that it was to be inferred in favour of the surety, that the payments were in liquidation of the latter account; *Marryatts v. White*, 2 *Stark.* 101; but the law will not, in favour of a surety, direct the application of money paid generally in discharge of the debt secured, without some circumstances to show that it was so intended. *Plomer v. Long*, 1 *Stark.* 153. *Williams v. Rawlinson*, 3 *Bingh.* 71.

When A. has a demand against B. as executor, and also another demand against him in his own right, and B. makes a general payment, A cannot apply it to the former demand; *Goddard v. Cox*, 2 *Str.* 1194; and where there are two demands, one legal, and the other illegal, and a general payment is made, the law will apply it to the discharge of the legal

demand. *Wright v. Laing*, 3 *B. and C.* 165. But where one of the demands is for spirituous liquors supplied in quantities not amounting to 20*s*. at a time, the party receiving the money may apply it to that demand; the statute 24 G. 2, c. 40, *ante p.* 308, only preventing the seller from maintaining an action. *Cruickshanks v. Rose*, 1 *Moo. and Rob.* 100, 5 *C. and P.* 19, *S. C.* And in such a case the creditor may apply the payment to the demand for spirituous liquors, although his particulars claim the whole demand, and he may make the appropriation at any time before the matter comes before the jury. *Philpott v. Jones*, 4 *Nev. and M.* 14.

As to cases in which payment will be presumed, *vide ante p.* 17, and as to the proof of payment by receipts, *ante p.* 37.

Payment by bill or note.] If the seller of goods takes notes or bills for them, without agreeing to run the risk of the notes being paid, and they turn out to be worth nothing, this will not be considered as payment. *Owenson v. Morse*, 7 *T. R.* 64. *Swinyard v. Bowes*, 5 *Maule and S.* 62. But if the seller agree to run the risk of the bill being bad, and to take it as payment or cash, he cannot, on the dishonour of the bill, resort to his original cause of action. *Ward v. Evans*, 2 *Salk.* 442, 7 *T. R.* 66. By an agreement entered into between the plaintiff together with other creditors, and the defendant, the defendant agreed to pay a composition of 15*s*. in the pound by two instalments, and a surety, in consideration of the creditors agreeing to discharge the defendant from all debts on receiving such composition. agreed to pay a sum of money in part payment of the first instalment, and to accept a bill of exchange drawn by the defendant in part payment of the second, the creditors agreeing "to exonerate and discharge the defendant on payment of the said 15*s*. in the pound." It was also agreed, that several bills of exchange, the amount of which was equal to the residue of the sum payable on the composition, which had been before indorsed by the defendant, and handed over to the plaintiffs, "should be considered as part payment of the said 15*s*. in the pound." It was held, that the bills left in the hands of the plaintiffs were not, under this agreement, to be considered as an absolute payment, unless they were paid when at maturity, and one of them having been dishonoured, that the defendant remained liable upon his indorsement. *Constable v. Andrew*, 2 *Crom. and M.* 293. Where a purchaser gives the seller an order upon a third person entitling him to receive *cash*, instead of which the vendor elects to take a bill, in such case, though the bill is dishonoured, the purchaser is discharged. *Vernon v. Bouverie*, 2 *Show.* 296. *Smith v. Ferrand*, 7 *B. and C.* 19. But it is otherwise if the order is upon the purchaser's agent, and the seller takes from him a check which is dishonoured. *Everett v. Collins*, 2 *Campb.* 515.

7 *B. and C.* 24, 25. Where the master of a vessel took from the freighter's agent abroad, who was furnished with funds to pay him the freight, a bill upon a third person, which was dishonoured, it was held by Gibbs, C. J., that the freighter was not thereby discharged. *Marsh v. Pedder*, 4 *Campb.* 257. If the master of a vessel is to get payment in the best mode he can, and has no power to get any thing but a bill, he must take that, but if he could get paid in any other mode, he should do so, otherwise he will be bound by taking a bill. *Per Bayley, J., Strong v. Hart*, 6 *B. and C.* 161; *and see Taylor v. Briggs, M. and M.* 28; *Robinson v. Read*, 9 *B. and C.* 449.

Payment by bills is *primâ facie* evidence of payment, without showing that such bills were paid; it is for the plaintiff to show that they have been dishonoured; *Hebden v. Hartsink*, 4 *Esp.* 46; *Stedman v. Gooch*, 1 *Esp.* 4; and where the purchaser gave the seller of goods an order on his banker for a "good bill on London," to the amount of the goods, and the seller took a bill which was afterwards dishonoured, Lord Kenyon held that it was incumbent on the seller to take care that he got a good bill, and that he could not on its being dishonoured have recourse to his demand for goods sold. *Bolton v. Reichard*, 1 *Esp.* 106. So where goods were sold "without recourse to the buyer in case of non-payment," for a bill which the vendee knew to be worth nothing, it was held that the vendor could not sue in assumpsit for the price of the goods, but that his remedy was an action of tort. *Read v. Hutchinson*, 3 *Campb.* 352. Where a bill indorsed in blank is taken by the vendor for goods, and lost before it is paid, the vendor can neither recover for the price of the goods nor upon the bill. *Champion v. Terry*, 3 *B. and B.* 295. But where the purchaser of goods accepted a bill drawn in favour of the seller, who lost it before he indorsed it, it was held that this was no defence in an action for the value of the goods. *Rolt v. Watson*, 4 *Bingh.* 273.

Credit given by the party ultimately liable on a bill, to the holder, is equivalent to payment, but it is otherwise with regard to intermediate parties. *Atkins v. Owen*, 4 *Nev. and M.* 123. *Gillard v. Wise*, 5 *B. and C.* 134, 7 *D. and R.* 523, *S. C.*

Giving a check is *primâ facie* evidence of payment, where a debt is due, but this may be rebutted by circumstances showing that it was a loan. *Boswell v. Smith*, 6 *C. and P.* 60. *vide ante p.* 18.

Release.

A release must, by the new rules, be specially pleaded. After breach the contract can only be discharged by a release under seal, but before breach it may be discharged by parol, *ante p.* 14.

Though a release of the whole debt, given to one of two joint-

contractors, enures to the benefit of both, yet receiving a portion of a debt and putting an end to an action against one of the contractors, is not a release of the other. *Watters v. Smith*, 2 *B. and Ad.* 889. So a release under seal to one may reserve the right of proceeding against the other. *Solly v. Forbes*, 2 *B. and B.* 38. But where the right is not reserved in the release itself, parol evidence of the reservation cannot be given. *Cocks v. Nash*, 9 *Bingh.* 341.

Set-off.

It is only necessary to plead a set-off where there are cross demands; for where the nature of the employment, transaction, or dealings, necessarily constitutes an account consisting of receipts and payments, debts, and credits, the *balance* only is the debt. *See Green v. Farmer*, 4 *Burr.* 2221.

A set-off must by the new rules be specially pleaded.

Where the defendant pleaded by way of set-off a bond given to him by the plaintiff, conditioned for payment of an annuity to a third person, which had been previously granted by the defendant, and that a certain sum was in arrear, it was held that the defendant was not bound to prove that he had paid the money, in order to set it off, but that on production of the bond the plaintiff was bound to prove payment. *Penny v. Foy*, 8 *B. and C.* 11.

Where the defendant pleads a set-off the plaintiff is not obliged to prove the whole of his account in the first instance, but may prove only the balance, and on the defendant's establishing his set-off may prove other parts of his account to cover it. *Williams v. Davies*, 1 *Crom. and M.* 464.

Nature of the debt set-off, and of the debts against which it is set-off.] In cases where either of the debts shall accrue by reason of a penalty in any bond or specialty, the plea must show how much is justly due on either side. 8 G. 2, c. 24, s. 4. The demand intended to be set-off must be liquidated. *Freeman v. Hyett*, 1 *W. Bl.* 394. Thus a guarantee of a certain sum of money cannot be set-off. *Crawford v. Stirling*, 4 *Esp.* 207. So in an action by a servant against his master for wages, the latter cannot set-off the value of goods lost by the negligence of the former; but if it should be proved to be part of the original contract, that the servant should pay, out of his wages, the value of his master's goods lost, through his negligence, this would be tantamount to an agreement that the wages should be paid, only after deducting the value of the things so lost, which, in an action of *indebitatus assumpsit*, would be a good defence under the general issue. *Le Loir v. Bristow*, 4 *Campb.* 134. A stipulated sum to be paid on the non-performance of certain work, as stipulated liquidated damages, may be a subject of a set-off. *Fletcher v. Dyche*, 2 *T. R.* 32.

Where A. took possession of premises on the 2d of June, and a sum of money became due for ground-rent on the 24th, for the quarter ending that day, which A. paid; it was held, in an action for mesne profits against A., that he was entitled to deduct the money so paid from the damages. *Doe v. Hare*, 2 *Crom. and M.* 145.

A judgment may be pleaded by way of set-off, though a writ of error be pending thereon; *Reynolds v. Beerling, cited* 3 *T. R.* 188; *see Curling v. Innes*, 2 *H. Bl.* 372; and where in an action on a promissory note for 30*l.* the plaintiff took a verdict for the whole sum, and the defendant had, at the same sittings, an action against the plaintiff for 11*l.*, to which there was a notice to set-off the note of hand, the court held that notwithstanding the verdict, the note might be set-off. *Baskerville v. Brown, B. N. P.* 180, 2 *Burr.* 1229, *S. C. Evans v. Prosser*, 3 *T. R.* 186. A debt cannot be set-off till the time at which it is actually due. *Rogerson v. Ladbrooke*, 1 *Bingh.* 99. A debt barred by the statute of limitations cannot be set-off; and if pleaded, the plaintiff may reply the statute. *B. N. P.* 180.

With regard to the nature of the demand against which the set-off is claimed, it is held that it must be for liquidated damages. Therefore in assumpsit for not indemnifying the plaintiff against certain accommodation acceptances, whereby he was forced and obliged to pay to the holders of the bills certain sums of money, with interest, charges, and expenses, it was held that a set-off could not be pleaded; *Hardcastle v. Netherwood*, 5 *B. and A.* 93; *Auber v. Lewis, Mann. Index*, 251; but the defendant might, perhaps, have pleaded a set-off to that part of the count which charged him with the amount of the acceptances paid by the plaintiff. *Per Cur. ibid.* And where the plaintiff declared specially in assumpsit for not accounting, with a count for money had and received, and non assumpsit was pleaded to the whole declaration, and a set-off to the general count, and the plaintiff proved a balance due to him, which might have been recovered under either count, Gibbs, C. J., held that the defendant might avail himself of his set-off. *Birch v. Depeyster*, 4 *Campb.* 387.

The demands must be mutual, and due in the same right.] In order to constitute a valid set-off the demands must be mutual, and due in the same right.

Bankrupts.] By statute 6 G. 4, c. 16, s. 16, where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the commissioners shall state the account between them, and one debt or demand may be set against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit given to, or the

debt contracted by, him; and what shall appear due on either side, on the balance of such account, and no more, shall be claimed or paid on either side respectively; and every debt or demand thereby made proveable against the estate of the bankrupt, may also be set-off in manner aforesaid against such estate; provided that the person claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy, by such bankrupt committed. *See similar clause in* 5 *G.* 2, *c.* 30, *s.* 28. *Vide post,* "*Actions by Assignees of Bankrupts.*" After the bankruptcy of A., and before his certificate, B., one of his creditors, purchases goods from him. In an action brought by A., after obtaining his certificate, for the price of the goods, the old debt cannot be set-off, being barred by the certificate. *Haylar v. Sherwood*, 2 *Nev. and M.* 401. On the 2d January, 1832, the defendants, bankers, received from B. C. a bill of exchange for 760*l.*, drawn by M. on his partners, indorsed by them to B. C. and by B. C. to the defendants. On the 6th the bill became due, and M. having failed the same day, the bill was dishonoured. On the 7th the defendants, who then had in their hands sufficient assets of B. C. to cover the bill, returned it to B. C. with a receipt for the amount indorsed; and having, on the 2d, entered the bill to the credit of B. C., now entered it as a debit. The defendants were also the acceptors of a bill for 1000*l.* drawn by B. C., indorsed to M., and due on the 12th January. On the 9th B. C. sent back the 760*l.* to the defendants, with instructions to carry into effect the views expressed by B. C. in a letter addressed to the defendants on the 6th, in anticipation of M.'s failure. That letter was as follows: "We think that you would be entitled to retain the 1000*l.* as a set-off for the 760*l.*; at all events, we will trust to your doing the best for us in this matter." In an action against the defendants, by the assignees of M. on the 1000*l.* bill, the jury having found the transaction between the defendants and B. C. as to the 760*l.* bill was closed on the 7th; it was held that the defendants could not set-off that bill against the 1000*l.* bill. *Belcher v. Lloyd*, 10 *Bingh* 310, 3 *Moore and S.*, 822 *S. C.*

Executors.] By 2 G. 2, c. 22, s. 13, where either party sues or is sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set off against the other. But in an action by an executor in his own name, to recover money due to the testator in his lifetime, and received by the defendant after his death, the defendant cannot set-off a debt due to him from the testator. *Shipman v. Thompson, Willes,* 103. So where the plaintiff declares *as executor,* if the cause of action arose after the death of the testator. *Kilvington v. Stevenson, Selw. N. P.* 145.

Factors and Agents.] An agent employed to recover a sum of money is entitled to retain a just allowance for his labour and service therein, and as such allowance is not in the nature of a cross demand, or mutual debt, he may give it in evidence under the general issue. *Dale v. Sollet*, 4 *Burr*. 2133, *ante p*. 318. And when the plaintiff sues in *indebitatus assumpsit* this still appears to be law, notwithstanding the new rules. Where a factor sells goods without disclosing the name of his principal, the purchaser, in an action by the principal for the price, may set-off a debt due to himself from the factor. *Rabone v. Williams*, 7 *T. R*. 360 (*n*). *George v. Clagett*, 7 *T. R*. 359. *Carr v. Hinchliff*, 4 *B. and C*. 547. Yet if before they are all delivered, and before any part of them is paid for, the purchaser is informed that they belonged to a third person, in an action by the latter, the purchaser cannot set-off a debt due to him by the factor, for this is not a case of mutual credit. *Moore v. Clementson*, 2 *Campb*. 22. A broker (whose character differs materially from that of a factor), in selling goods without disclosing the name of his principal, acts beyond the scope of his authority, and the buyer therefore cannot set-off a debt due from the broker to him, in an action for the goods by the principal. *Baring v. Corrie*, 2 *B. and A*. 137; *see statute* 6 *G*. 4, *c*. 94, *s*. 1, 2, 6.

Husband and Wife.] A debt due to a man *jure uxoris*, cannot be set-off in an action against him on his own bond; *B. N. P*. 179; nor can a debt due from a wife, *dum sola*, be set-off in an action brought by the husband alone, unless he has made himself individually liable. *Wood v. Akers*, 2 *Esp*. 594. So where the husband alone sues on a promissory note given to his wife, a debt due to the maker from the wife, *dum sola*, cannot be set-off. *Burrough v. Moss*, 10 *B. and C*. 558.

Partners] A debt due to a surviving partner may be set-off against a demand upon him in his own right; *Slipper v. Stidstone*, 5 *T. R*. 493, and *è converso*, *French v. Andrade*, 6 *T*. 582. In an action brought by an ostensible and dorman partner, the defendant may set-off a debt due to him from the ostensible partner only; *Stacey v. Deey*, 2 *Esp*. 469, 7 *T. R*. 361 (*n*), *S. C.*; and where a note was given by D. to his bankers, A., B., and C., who indorsed it to B. and C., who carried on business separately, it was held by Lord Kenyon, that in an action on the note by B. and C., D. might set-off a a demand due to him from A., B., and C. *Puller v. Roe*, *Peake*, 197.

Trustees.] In an action by a trustee to recover a debt for the benefit of the *cestui que trust*, the defendant cannot set-off

a debt due to him from the *cestui que trust*. *Tucker v. Tucker*, 1 *Nev. and M.* 477.

Statute of Limitations.

The Statute of Limitations must be pleaded, and cannot be given in evidence under *non assumpsit.* 2 *Saund.* 63 *B.* (*n*).

When the statute begins to run.] In assumpsit the statute begins to run from the time of the breach of promise. Therefore in an action against an attorney, in which it was stated as a breach, that the defendant neglected to make a search at the Bank of England, to ascertain whether certain stock was standing in the names of certain persons, it was held that the omission to search having taken place upwards of six years before, the statute was a bar, though the omission was not discovered till within the six years. *Short v. M'Carthy*, 3 *B. and A.* 626. *Brown v. Howard*, 2 *B. and B.* 73. *Battley v. Faulkner*, 3 *B. and A.* 288. So in tort. *Howell v. Young*, 5 *B. and C.* 259, *vide post.* So upon promises to indemnify, the statute runs from the time of damnification. *Huntley v. Sanderson*, 1 *Crom. and M.* 467. So where a bill of exchange is drawn payable at a future period, for the amount of a sum of money lent by the payee to the drawer at the time of drawing the bill, the payee may recover in an action for money lent, at any time within six years from the time when the money was to be repaid, *i. e.* when the bill became due, and not from the time of the loan. *Wittershein v. Countess of Carlisle*, 1 *H. Bl.* 631. When a note is payable on demand, it is payable immediately, and the statute begins to run from the date; *Christie v. Fonsic*, *Selw. N. P.* 131; *see Mann. Index*, 202; but where a note is made payable 24 months after demand, the cause of action does not accrue, and the statute does not begin to run, until 24 months after demand made; *Thorpe v. Booth*, *R. and M.* 388; so where the note is payable after sight, the statute runs only from the time of presentment. *Holmes v. Kerrison*, 2 *Taunt.* 323; *and see Savage v. Aldren*, 2 *Stark.* 232. Where the cause of action does not arise until after request made, the statute will only run from the time of such request. *Gould v. Johnson*, 2 *Salk.* 422. 2 *Saund.* 63, *b* (*n*).

Subsequent acknowledgment.] The effect of the statute of limitations may be avoided, by proof of an acknowledgment of the debt within six years, which acknowledgment is said to be evidence of a *new promise* to pay the debt, and not merely operating to draw down the original promise to the time when the acknowledgment is made. *Heylin v. Hastings*, 1 *Ld. Raym.* 422. *Hurst v. Parker*, 1 *B. and A.* 93. *Pittam v. Foster*, 1 *B. and C.* 248. *A'Court v. Cross*, 3 *Bingh.* 332. *Boydell v. Drummond*, 2 *Campb.* 162; *but see Perham v. Raynal*,

2 *Bingh.* 308, *Thornton v. Illingworth*, 2 *B. and C.* 826. A verbal promise was formerly held sufficient to revive a written guarantee. *Gibbons v. M'Casland*, 1 *B. and A.* 690. But the law has been altered by Lord Tenterden's act.

Acknowlegment. Lord Tenterden's Act.] By statute 9 G. 4, c. 14, (reciting the statute of limitations, 21 Jac. 1, c. 16, and the Irish Act, 10 Car. 1,) and that various questions have arisen in actions founded on simple contract, as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking cases out of the operation of the said enactments, &c., it is enacted,

Section 1, That in actions of debt, or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed by the party chargeable thereby; and that where there shall be two or more joint contractors, or executors, or administrators of any contractor, no such joint contractor, executor, or administrator shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them; provided always, that nothing therein contained shall alter or take away or lessen the effect of any payment of principal or interest made by any person whatever; provided also, that in actions to be commenced against two or more such joint contractors, or executors, or administrators, if it shall appear at the trial, or otherwise, that the plaintiff, though barred by either of the said recited acts, or this act, as to one or more of such joint contractors, executors, or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment, or promise, or otherwise, judgment may be given, and costs allowed for the plaintiff, as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff.

Section 2, That if any defendant or defendants in any action on any simple contract, shall plead any matter in abatement, to the effect that any other person or persons ought to be jointly sued, and issue be joined on such plea, and it shall appear at the trial that the action could not, by reason of the said acts, or this act, or of either of them, be maintained against the other person or persons named in such plea, or any of them, the issue joined on such plea shall be found against the party pleading the same.

Section 3, That no indorsement or memorandum of any payment, written or made after the time appointed for this act to take effect, upon any promissory note, bill of exchange, or other writing, by or on the behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of the said statutes.

Section 4, That the said recited acts, and this act, shall be deemed and taken to apply to the case of any debt or simple contract alleged by way of set-off on the part of any defendant, either by plea, notice, or otherwise.

The effect of Lord Tenterden's act appears to be not to alter the law relating to acknowledgments and promises sufficient to take a case out of the statute of limitations, further than by requiring such acknowledgment or promise to be in writing, and signed by the party chargeable. No alteration is introduced in the form of the acknowledgment or promise, or with regard to the party to whom it is made; *see Haydon v. Williams*, 4 *Moore and P.* 818, 7 *Bingh.* 163, *S. C*; though an acknowledgment to take the case out of the statute must be such as will raise an implication of a promise to pay. *Bridgstock v. Smith*, 1 *Crom. and M.* 483. The former decisions on these points are still to be considered as authority. The act operates from the 1st of January 1829, in cases where the promise was before that day. *Hilliard v. Lenard*, *M. and M.* 297.

In an action by an administratrix in which the statute of limitations was pleaded, it appeared that the cause of action arose more than six years before, but that within six years the defendant and the agent of the plaintiff had gone over the items of the account, and struck a balance which the defendant promised verbally to pay; it was objected that this was within the 9 G. 4, c. 14; but Vaughan B., said, "I think the plaintiff has shown a good cause of action upon the count on an account stated. She does not go upon the original debt at all. I take the statute to apply to cases where you go for the original debt, and then give some evidence of an acknowledgment to rebut the presumption raised by the statute of limitations, that the debt has been satisfied." *Smith v. Forty*, 4 *C. and P.* 126.

The payment of interest within six years, accruing due upon a note more than six years ago, is sufficient to take the case out of the statute. *Bealy v. Greenslade*, 2 *C. and J.* 61.

It seems that the drawing of a bill is not evidence of the acknowledgment of a debt due on account of the original demand for which the bill is given. *See Gowan v. Forster*, 3 *B. and Ad.* 512.

Where the debtor stated that family arrangements had been

making, to enable him to discharge the account, that funds had been appointed for that purpose, of which B. was trustee, to whom he had handed the account, and that B. had authorised him to refer the creditor to him; this was held not to take the case out of the statute, the debtor not charging *himself* by the acknowledgment. *Whippy v. Hilary*, 3 *B. and Ad.* 399. So a letter from an authorised agent of the defendant will not charge him. *Gibson v. Bagshott*, 5 *C. and P.* 211.

Acknowledgment—by whom.] The acknowledgment must be made, under Lord Tenterden's Act, by the party chargeable. An acknowledgment by a person to whom the defendant has referred, and who has made payments for the defendant, was formerly sufficient. *Burt v. Palmer*, 5 *Esp.* 145. The cases relating to part payment are still to be considered authority. It must appear that the payment was on account of the debt for which the action was brought, and that it was made as part payment of a greater debt. *Tippets v. Heane*, 1 *Crom. M. and R.* 252. Part payment by one of several makers of a joint and several promissory note, has been held to be such an acknowledgment as to take the case out of the statute, as against all the makers; *Whitcomb v. Whiting*, 2 *Dougl.* 652; *see* 1 *B. and A.* 467, 2 *B. and C.* 28, 30; *Wyatt v. Hodson*, 8 *Bing.* 309; *Chippindale v. Thurston*, *M. and M.* 411; *Pease v. Hirst*, 10 *B. and C.* 122; though the others have signed as sureties only; *Perham v. Raynal*, 2 *Bingh.* 306; but it was ruled by Lord Ellenborough, that it is not sufficient merely to show a payment by a joint maker of a note to the payee within six years, without showing that it was made on account of the note; for an acknowledgment, to bind a partner, ought to be clear and distinct. *Holme v. Green*, 1 *Stark.* 488. In an action against A., on a note made by him, and B. C., (the signature of the latter being attested by a witness), the plaintiff cannot take the case out of the statute by showing payments by B., without calling the attesting witness. *Wilde v. Porter*, 3 *Nev. and M.* 585. An acknowledgment by payment of interest cannot be proved by the verbal admission of the defendant. *Willis v. Newham*, 1 *Lloyd and W.* 197. Where A. and B. made a joint and several promissory note, and A. died, and ten years after his death, B. paid interest upon the note, it was held that such payment did not take the case out of the statute, so as to make A.'s executors liable; for B. and the executors did not remain jointly liable, nor were they liable in the same capacity. *Atkins v. Tredgold*, 2 *B. and C.* 23. So after the death of one maker of a joint and several promissory note signed by two, a payment upon it by the executor of the deceased party will not take the debt out of the statute of limi-

tations as against the survivor. *Slater v. Lawson,* 1 *B. and Ad.* 396. And it was ruled that, as against an executor, an *acknowledgment* merely is not sufficient to take the case out of the statute, but there must be an express promise, and if there are several executors, a promise by all. *Tullock v. Dunn, R. and M.* 416. So by Lord Tenterden's Act, where there are two or more joint contractors, or executors, or administrators, there must be a written promise or acknowledgment by each. Where an action was brought against A. and B., and C. his wife, upon a joint promissory note, made by A. and C. before her marriage, and the promise was laid by A. and C. before her marriage, and the statute of limitations was pleaded, upon which issue was joined, it was held that an acknowledgment of the note by A. within six years, but after the intermarriage of B. and C., was not evidence to support the issue. *Pittam v. Foster,* 1 *B. and C.* 248.

Where A., B., and C., overseers, borrowed money for the parish, and gave promissory notes, signed by them as overseers, for the amount, payment of interest by the vestry (the accounts being signed by A.) was held to take the case out of the statute. *Rew v. Pettit,* 1 *Ad. and Ell.* 196, 3 *Nev. and M.* 456, *S. C. nomine Crew v. Pettit.*

Acknowledgment—to whom.] An acknowledgment, being evidence of a new promise, must be to a person who is in existence to receive it; and therefore in an action by an executrix, a statement by the defendant to her, that "the testator always promised never to distress him for it," was held to be no evidence of a promise to pay, made to the testator within six years. *Ward v. Hunter,* 6 *Taunt.* 210. 1 *B. and C.* 251. An acknowledgment by the acceptor of a bill that he was indebted on it to the payees, but that he was not indebted to the drawer, there being no consideration for the bill, is not sufficient to take the case out of the statute, in an action by the drawer. *Easterby v. Pullen,* 3 *Stark.* 186. An acknowledgment made to a stranger that the debt is owing to the plaintiff, is sufficient; *Peters v. Brown,* 4 *Esp.* 46; so an acknowledgment within six years, in a deed between the defendants and third persons, of the existence of a debt due to the plaintiffs, who were strangers to the deed, is sufficient to take the case out of the statute. *Mountstephen v. Brooke,* 3 *B. and A.* 141; *and see Clarke v. Hougham,* 2 *B. and C.* 149. *Halliday v. Ward,* 3 *Campb.* 32. An acknowledgment made to an executor or administrator, will not support a count laying the promise to the testator, or intestate. *Sarell v. Wine,* 3 *East,* 409. 2 *Saund.* 63, *g* (*n*). Payment to an administrator (on a note) who has neglected to take out administration in the diocese in which the note is *bonum notabile,* is sufficient. *Clark*

v. Hooper, 10 *Bing.* 480, 4 *Moore and S.* 353, *S. C.* The trustees of certain legatees lent part of the trust money upon a promissory note, describing them as such trustees, to the defendant. A payment of part of the principal and interest to one of the legatees within six years, was held to take the case out of the statute. *Megginson v. Harper*, 2 *Crom. and M.* 323, 4 *Tyr.* 94, *S. C.*

Acknowledgment—what sufficient.] In many cases a very slight acknowledgment has been held sufficient. Thus, where, in answer to an application for money due from the defendant, and C , the defendant, wrote, " I received your letter, and beg leave to refer you to my trustee Mr. W. H. on this complicated business. I should be glad to be informed how you have settled it with C.," Lord Kenyon held the acknowledgment sufficient. *Bailey v. Lord Inchiquin*, 1 *Esp.* 435. " What an extravagant bill you have delivered me!" is an acknowledgment of some money being due. *Lawrence v. Worrall, Peake*, 93. In an action on a promissory note the following acknowledgment was held sufficient, the defendant not showing that there were other matters besides the promissory note to which the acknowledgment could refer. " Business calls me to L. Should I be fortunate in my adventures you may depend on seeing me in B. in less than three weeks, otherwise I must arrange matters with you as circumstances will permit." *Frost v. Bengough*, 1 *Bingh.* 266. *See also Colledge v. Horn*, 3 *Bingh.* 119. So, " I will not pay; there are none paid; and I do not mean to pay unless obliged; you may go and try." *Dowthwaite v. Tibbutt*, 5 *Maule and S.* 75. *See* 4 *D. and R.* 179. In an action on a bill of exchange, two letters were relied on to take the case out of the statute. The first stated that the defendant would feel obliged by his correspondent's offer of assistance to settle with Mr. F. (the plaintiff), and in the present state of his affairs he could only say he should feel much indebted to Mr. F. to withdraw his outlawry, and that Mr. F.'s claims should receive that attention which, as an honourable man, he considered them to deserve. In the second letter the defendant stated that he was ready to do any thing, and every thing, to satisfy Mr. F. and all his creditors. There was no evidence that the defendant had been outlawed in the action. The court held that this was not a sufficient acknowledgment; and *per Tindal, C. J.*, " The question is, whether these letters constitute a distinct and unqualified acknowledgment of an existing debt. Now the first letter points to a debt on which the defendant had been proceeded against to outlawry, and though this record might not of necessity show whether the defendant had been outlawed or not, yet unless the plaintiff proved that circumstance, his claim would not appear to be one to which the acknowledgment in the

letter could apply; but neither of the letters import such a direct and unqualified acknowledgment of a debt as would authorise the court in implying a promise to pay. They import no more than an offer on the part of the defendant to surrender his income with a view to an arrangement with his creditors, provided he should be allowed time to arrange his affairs." *Fearn v. Lewis*, 6 *Bingh.* 349, 4 *M. and P.* 1, 4 *C. and P.* 173, *S. C.* An acknowledgment after action brought is sufficient. *Yea v. Fouraker*, 2 *Burr.* 1099. A promise in writing, to pay "the balance due," is sufficient within the statute, without further expression of the amount; but without some other evidence, to show what the balance is, the plaintiff is only entitled to nominal damages. *Dickinson v. Hatfield*, 1 *Moo. and Rob.* 141.

The following passages, in letters from the defendant in answer to one of the plaintiff's not produced, have been held to be sufficient, and not conditional. "I can never be happy until I have not only paid you every thing, but all to whom I owe money. It is impossible to state to you what will be done in my affairs at present. It is difficult to know what will be best, but immediately it is settled you shall be informed." "Your account is quite correct, and oh! that I were going to enclose the amount of it." "If she (another creditor) will only have patience, I will in time pay every farthing, as also Miss D." (the plaintiff.) The court held, however, that the plaintiff was only entitled to nominal damages, no other evidence having been given of the amount of the debt. *Dodson v. Mackey*, 4 *Nev. and M.* 327. A promise to pay a *proportion* of a *joint* debt is sufficient, though no amount is specified; the plaintiff may prove the amount by other evidence. *Lechmere v. Fletcher*, 1 *Crom. and M.* 623, 3 *Tyr.* 450, *S. C.* An entry in a bankrupt's examination of a certain sum being due to A., is sufficient to take the case out of the statute. *Eicke v. Nokes*, 1 *Moo. and Rob.* 359. The following acknowledgment was held to be sufficient to take the case out of the statute. "I beg to say, I cannot comply with your request. The best way for you will be to send another bill, and draw another for the balance of your money, 30*l.*" It was also held not to be necessary to give evidence of another bill having been drawn. *Dubbs v. Humphries*, 10 *Bingh.* 406, 4 *Moore and S.* 285, *S. C.*

Acknowledgment—what not sufficient.] Where, in answer to a letter from the plaintiff's attorney, the defendant wrote, "Sir, as soon as I am able to attend to my concerns, I shall wait on Captain C. (the plaintiff), whom I shall be able to satisfy respecting the misunderstanding which has occurred between us," Gibbs, C. J., thought it not sufficient to take the case out of the statute. *Craig v. Cox*, *Holt*, 380. So where,

in answer to a demand for charges relative to the grant of an annuity, the defendant said, "He thought it had been settled at the time the annuity was granted; that he had been in so much trouble since, that he could not recollect any thing about it." *Hellings v. Shaw*, 1 *B. Moore*, 340, 7 *Taunt*. 611, *S. C.* So where the defendant, having denied the existence of the debt, said, on being requested to look at documents in proof of it, "It is no use for me to look at them, for I have no money to pay it now." *Snook v. Mears*, 5 *Price*, 636. So where the defendant referred the plaintiff to his attorney, "who was in possession of his determination and ability." *Bicknell v. Keppel*, 1 *Bos. and Pull. N. R.* 20. Where the acknowledgment was, "I cannot afford to pay my new debts, much less my old ones," and the jury negatived the acknowledgment, the court refused a new trial. *Knott v. Farren*, 4 *D. and R.* 179. So, "I will see my attorney, and tell him to do what is right." *Miller v. Caldwell*, 3 *D. and R.* 267. So, where the defendant, on being arrested, said, "I know that I owe the money, but the bill I gave was on a three-penny receipt stamp, and I will never pay it;" the acknowledgment was held insufficient. *A'Court v. Cross*, 3 *Bingh*. 329. Where the expressions of the defendant are ambiguous, it is a question of fact for the jury whether they amount to an acknowledgment of the debt. *Lloyd v. Maund*, 2 *T. R.* 760.

Acknowledgment—when accompanied with denial of liability.] Where the defendant *acknowledges the debt*, but insists at the same time *that the statute bars it*, such acknowledgment has been held in several cases to take the case out of the statute. *Bryan v. Horseman*, 4 *East*, 599. *Rucker v. Hannay*, *Id*. 604 (*n*). *Clarke v. Bradshaw*, 3 *Esp*. 157. *Leaper v. Tatton*, 16 *East*, 420; *but see Rowcroft v. Lomas*, 4 *Maule and S.* 457, *Coltman v. Marsh*, 3 *Taunt*. 380.

Where the defendant acknowledges the debt, but insists *that it is paid or discharged*, the whole of his admission must, as it seems, be taken together, (*vide ante p.* 47,) and the case will not be taken out of the statute. Thus, where the defendant said, "I have paid the debt, and will send you a copy of the receipt," but such copy was never sent, Lord Ellenborough held the acknowledgment insufficient. *Birk v. Guy*, 4 *Esp*. 184. But in another case, where the acknowledgment was, "that he would satisfy the plaintiff, for he could show his receipt," it was held that the defendant was bound to produce a receipt, and that it was at all events a sufficient acknowledgment to go to a jury, upon his failing to produce a receipt. *Anon. cited Holt*, 381.

So, where the acknowledgment was, "You owe me more money, I have a set-off against it," it was held (Best, J., *dis.*)

not to take the case out of the statute. *Swann v. Sowell*, 2 *B. and A.* 759. So, where on application for the amount of a bill the defendant said, "that there had been such a bill, but that the plaintiff and his deceased partner had received the money, and that there was a balance due to him (the defendant) from the executors of the deceased," the acknowledgment was held not to be sufficient, and it was doubted whether the plaintiff could go into evidence of the account between the deceased partner and the defendant, to falsify what the latter said. *Beale v. Nind*, 4 *B. and A.* 568. It seems, however, that where the defendant, in his acknowledgment, rests his discharge upon a written instrument to which he refers with precision, evidence of that instrument may be given to show that it does not operate as a legal discharge. *Partington v. Butcher*, 6 *Esp.* 66. *Hellings v. Shaw*, 1 *B. Moore*, 344. *Beale v. Nind*, 4 *B. and A.* 572. *See also De la Torre v. Salkeld*, 1 *Stark.* 7. *Easterly v. Pullen*, 3 *Stark.* 186. Where the acknowledgment was, "I acknowledge the receipt of the money, but the testatrix gave it me," it was held not sufficient to take the case out of the statute. *Owen v. Woolley*, *B. N. P.* 148.

Acknowledgment—conditional.] Where the acknowledgment is conditional it has been held that the plaintiff must show the condition performed; thus, where the defendant promised to pay the debt when he was able, Lord Kenyon ruled that the plaintiff was bound to show that the defendant was then of sufficient ability to pay, adding, that it had been so ruled before by Eyre, C. J. *Davies v. Smith*, 4 *Esp.* 35; *and see Besford v. Saunders*, 2 *H. Bl.* 116. Where the acknowledgment was, "I shall be happy to pay you both principal and interest when convenient. I shall pay no more interest till we have a fair settlement," it was held that the plaintiff was bound to show that it was convenient to pay, and also, as it seems, that a settlement had taken place. *Edmunds v. Downes*, 4 *Tyr.* 73. So where the promise was, "I cannot pay the debt at present, but I will pay it as soon as I can," the court of King's Bench held that it was necessary for the plaintiff to show the defendant's ability to pay. *Tanner v. Smart*, 6 *B. and C.* 603. *Ayton v. Bolt*, 4 *Bingh.* 105. *A'Court v. Cross*, 3 *Bingh.* 329. *Haydon v. Williams*, 7 *Bingh.* 163, 4 *M. and P.* 818. *S. C.* But where the defendant said, that if certain other persons paid he should do the same, Lord Ellenborough held that the plaintiff was entitled to recover without proof that the other persons had paid. *Loweth v. Fothergill*, 4 *Campb.* 185. So where the defendant promised to pay the debt by instalments if time were given, Lord Ellenborough was of opinion that this was sufficient, and the plaintiff recovered without proof of time being given. *Thompson v. Os-*

borne, 2 *Stark.* 98. *See also Campbell v. Sewell*, 1 *Chitty*, 609. *Fleming v. Hayne*, 1 *Stark.* 370. *Dodson v Mackay*, 4 *Nev. and M.* 327.

Mutual accounts.] Such accounts as concern the trade of merchandise between merchant and merchant are excepted from the operation of the statute. Where there have been mutual current and unsettled accounts between the parties, and any of the items are within six years, such items are evidence, (under the replication that the defendant did promise, &c.) as an admission of there being an open account, so as to take the case out of the statute, like any other acknowledgment. *Catling v. Skoulding*, 6 *T. R.* 189. 2 *Saund.* 227, *a* (*n*). *See Rothery v. Munnings*, 1 *B. and Ad.* 15. But where all the items are on one side, the statute is a bar to all demands above six years' standing. *Cotes v. Harris*, *B. N. P.* 149. Where there are mutual accounts, but no item of account at all within six years, the plaintiff may reply specially to the plea of the statute, that the accounts are merchants' accounts. 2 *Saund.* 127, *c* (*n*). But it has been held in equity that merchants' accounts are within the statute, if they have ceased six years. *Barber v. Barber*, 18 *Ves.* 286; *and see Jones v. Pengree*, 6 *Ves.* 580, *Martin v. Heathcote*, 2 *Eden*, 169. The clause in the statute as to merchants' accounts is not confined to persons actually merchants. *Catling v. Skoulding*, 6 *T. R.* 191.

Upon the issue whether the causes of action accrued within six years, an account between the parties unsettled will not, since the 9 G. 4, c. 14, take the case out of the statute; but there must be a payment, or something equivalent thereto. *Williams v. Griffiths*, 2 *Crom. M. and R.* 45.

Tender.

A plea of tender operates, like a plea of payment of money into court, as an admission of the contract stated in the declaration. *Cox v. Brain*, 3 *Taunt.* 95. Thus in an action on a guarantee it supersedes the necessity of proving it to be in writing. *Middleton v. Brewer*, *Peake*, 15.

By whom a tender must be made.] The tender need not be made by the debtor himself; it is sufficient if made by his agent, and a tender by an agent, at his own risk, of more than the money given him by his principal, is good. *Read v. Goldring*, 2 *Maule and S.* 86.

To whom a tender must be made.] A tender to a person authorised by the creditor to receive money for him, is sufficient. *Goodland v. Blewith*, 1 *Camph.* 477. And where a clerk, who was in the ordinary habit of receiving money for his master,

was directed by his master not to receive the sum in question, for that he had put it into the hands of his attorney, and the clerk, on tender made, refused to receive the money, assigning the reason, it was held to be a good tender to the principal. *Moffat v. Parsons*, 5 *Taunt.* 307. But a tender made to the managing clerk of the plaintiff's attorney, who at the time disclaimed authority from his master to receive the debt, was held insufficient. *Bingham v. Allport*, 1 *Nev. and Man.* 398. A tender to the attorney on the record is a good tender to the principal. *Crozer v. Pilling*, 4 *B. and C.* 26. *ante p.* 313. And a tender to a person in the office of the plaintiff's attorney, who is referred to on the subject by a clerk in the office, and who refuses the tender as being of an insufficient sum, is a good tender, without showing who that person was. *Wilmott v. Smith*, *M. and M.* 238, 3 *C. and P.* 453, *S. C.*; *and see Barrett v. Deere*, *Id.* 200, *ante p.* 313. Where the money was brought to the house of the plaintiff, and delivered to his servant, who retired, and appeared to go to his master, it was held to be evidence for the jury, from which they might infer that a tender was made. *Anon.* 1 *Esp.* 349. A tender to one of several partners is sufficient. *Douglas v. Patrick*, 3 *T. R.* 683. But a tender of a debt due to a bankrupt's estate, to a collector employed by the solicitor under the commission, is, as it seems, bad. *Blow v. Russell*, 1 *C. and P.* 365.

Tender, to what amount.] If a man tenders more than he ought to pay, it is good, for the other ought to accept so much as is due to him. *Wade's case*, 5 *Rep.* 115, *c.* *Astley v. Reynolds*, 2 *Str.* 916. But it seems that such a tender is only good where it is made in monies numbered, so that the creditor may take what is due to him. Therefore a tender of a 5*l.* note, from which the creditor is desired to take 3*l.* 10*s.*, is not good. *Betterbee v. Davis*, 3 *Campb.* 70. *Robinson v. Cook*, 6 *Taunt.* 336. *Watkins v. Robb*, 2 *Esp.* 710. *Brady v. Jones*, 2 *D. and R.* 305. But proof of a tender of 20*l.* 9*s.* 6*d.* in bank notes and silver, will support a plea of tender of 20*l.* *Dean v. James*, 4 *B. and Adol.* 546, 1 *Nev. and M.* 392, *S. C.* Where a party has several demands for unequal sums against several persons, a tender of one sum for the debts of all, is not a good tender of one of the debts. *Strong v. Harvey*, 3 *Bingh.* 304. But where a greater sum is tendered than the sum pleaded, and the creditor refuses to receive it, on the ground, that the amount is not sufficient, and not on account of the form of the tender, the tender is, it seems, good. *Black v. Smith*, *Peake*, 88. *Saunders v. Graham*, *Gow*, 121. A tender to one of several partners, including a debt due to the partnership, and also a debt due to that one partner individually, is a good tender of the partnership debt, unless objected to on account of

the form of the tender. *Douglas v. Patrick*, 3 *T. R.* 683; *and see Black v. Smith, Peake*, 88.

Tender, in what kind of money.] By statute 56 G. 3, c. 68, s. 11, the gold coin of the realm was declared to be the only legal tender for payments (except as therein after provided) within the United Kingdom of Great Britain and Ireland. And by s. 12, no tender of payment of money made in the silver coin of the realm of any sum exceeding the sum of 40*s*. at one time shall be a legal tender. Bank notes are not a legal tender for a sum under 5*l*. *Grigby v. Oakes*, 2 *B. and P.* 526. *Vide* 3 *and* 4 *W.* 4, *c.* 98, *infra.* But they have been held to be a good tender unless objected to at the time on that account. *Per Buller, J., Wright v. Reed*, 3 *T. R.* 554. *Brown v. Saul*, 4 *Esp.* 267. So a tender of a country bank note is good, where the creditor objects only to the *quantum* and not to the *quality* of the tender. *Polglass v. Oliver*, 2 *Crom. and Jer.* 15. *Lockyer v. Jones, Peake*, 180 (*n*); *see Mills v. Safford, ibid. contra, overruled.* So a tender of a banker's cheque. *Welby v. Warren, Tidd*, 183.

With respect to tendering money in bank notes the statute 3 and 4 W. 4, c. 98, s. 6, has provided, "that from and after the first day of August, 1834, unless and until Parliament shall otherwise direct, a tender of a note or notes of the Governor and Company of the Bank of England, expressed to be payable to bearer on demand, shall be a legal tender to the amount expressed in such note or notes, and shall be taken to be valid, as a tender to such amount, for all sums above *five* pounds, on all occasions on which a tender of money may be legally made, so long as the Bank of England shall continue to pay on demand their said notes in legal coin: Provided always, that no such note or notes shall be deemed a legal tender of payment by the Governor and Company of the Bank of England, or any branch bank of the said Governor and Company; but the said Governor and Company are not to become liable, or to be required to pay and satisfy, at any branch bank of the said Governor and Company, any note or notes of the said Governor and Company not made specially payable at such branch bank; but the said Governor and Company shall be liable to pay and satisfy, at the Bank of England in London, all notes of the said Governor and Company, or of any branch thereof."

Tender, whether the money must be actually produced.] The actual production of the money due, in monies numbered, is not necessary, if the debtor, having it ready to produce, and offering to pay it, the creditor dispense with the production of it at the time, or do any thing which is equivalent to that. *Per Lord Ellenborough, Thomas v. Evans*, 10 *East*, 101. Thus where

the defendant left 10*l.* with his clerk, for the plaintiff, of which the clerk informed the plaintiff when he called and demanded a larger sum, and the plaintiff said he would not receive the 10*l.*, nor any thing less than his whole demand, but the clerk did not offer the 10*l.*, this was held to be no tender. *Ibid. And see Dickinson v. Shee,* 4 *Esp.* 68. But where the defendant went to the plaintiff and told him that he had eight guineas and a half in his pocket, which he had brought for the purpose of satisfying his demand, but the plaintiff told him *he need not give himself the trouble of offering it,* for that he would not take it, the tender was held to be good. *Douglas v. Patrick,* 3 *T. R.* 684; *and see Ryder v. Townsend,* 7 *D. and R.* 119. But it would have been otherwise if, before the defendant could take the money out of his pocket, the plaintiff had left the room. *Leatherdale v. Sweepstone,* 3 *C. and P.* 342. The agent of the defendant met the plaintiff in the street and told him that he was come to settle the business between the defendant and him, and that he was desired by the defendant to offer him 4*l.*; the plaintiff said he would not take it; the witness then said that he would give him the other 10*s.* out of his own pocket, and run the risk of being repaid. He then pulled out his pocket-book, and told the plaintiff that if he would go into a neighbouring public-house he would pay him, but the plaintiff said *he would not take it;* this tender was held to be good. *Read v. Goldring,* 2 *Maule and S.* 86. Where a witness stated that she was present at an interview between the plaintiff and defendant, at which the defendant was willing to give the plaintiff 10*l.*; and that she (the witness) offered to go up stairs and fetch that sum, but that the plaintiff said *she need not trouble herself, for he could not take it,* this was held by Best, C. J., to be a good tender (the witness stating that the money was up stairs), though the defendant did not take any notice of the witness's offer at the time. *Harding v. Davies,* 2 *C. and P.* 77. But where the defendant ordered A. to pay the plaintiff 7*l.* 12*s.*, and the clerk of the plaintiff's attorney demanded 8*l.*, on which A. said that he was only ordered to pay 7*l.* 12*s.* which sum was in the hands of B., who was present, and B. put his hand to his pocket as if to pull out his pocket-book, when A. desired him not to do so, as the clerk demanded 8*l.* and he was ordered to pay 7*l.* 12*s.* only, and B. could not say whether he had the latter sum about him, but swore that he had it in his house, at the door of which he was standing, the tender was held to be insufficient. *Kraus v. Arnold,* 7 *B. Moore,* 59; *and see Glasscott v. Day,* 5 *Esp.* 49. On a plea of tender of 1*l.* 12*s.* 6*d.*, the jury found specially that the defendant's attorney called on the plaintiff, and said, "I come to pay you 1*l.* 12*s.* 6*d.* which the defendant owes you;" that the attorney put his hand in his pocket, but did not produce the money, the plaintiff saying "I can't take it; the

matter is now in the hands of my attorney." It was held that upon this finding the defendant was not entitled to judgment. *Finch v. Brook*, 1 *Bingh. N. C.* 253, 1 *Scott*, 70, *S. C.* But the court seem to have been of opinion that a dispensation from the production might have been implied.

Tender, must be unconditional.] In order to support a plea of tender, there must be evidence of an unqualified offer. Therefore, where the defendant tendered a sum of money, and at the same time delivered a counterclaim upon the plaintiff, and the plaintiff did not take up the money or paper, but simply said, "You must go to my attorney," the tender was held insufficient. *Brady v. Jones*, 2 *D. and R.* 305. So a tender accompanied with a protest against the party's liability, appears to be insufficient. *Simmons v. Wilmott*, 3 *Esp.* 94. So an offer of payment, clogged with a condition that it should be accepted as the balance due, does not amount to a legal tender. *Evans v. Judkins*, 4 *Campb.* 156; *and see Huxham v. Smith*, 2 *Campb.* 21; *Strong v. Harvey*, 3 *Bingh.* 304. So where the plaintiff offered to take the sum tendered, in part of his demand, but the defendant would only allow him to take it "as a settlement," it was held not a good tender. *Mitchell v. King*, 6 *C. and P.* 237. So where the tender is accompanied with a demand of a receipt in full. *Glascott v. Day*, 5 *Esp.* 48; *Higham v. Baddely*, *Gow*, 213; *Ryder v. Townsend*, 7 *D. and R.* 119. But though a party tendering money cannot in general demand a receipt for the money, yet where the creditor did not object to the demand of a receipt, but that the sum was insufficient, the tender was held by Lord Kenyon to be good. *Cole v. Blake*, *Peake*, 179. Yet where the defendant took the money out of his pocket and said, "If you will give me a stamped receipt, I will pay you the money," and the plaintiff replied that he would not take it, but would serve him with a Marshalsea writ, Abbott, C. J., held this to be no proof of a tender. *Laing v. Meader*, 1 *C. and P.* 257. The debtor ought to bring a receipt with him, and require the creditor to sign it, and if the latter refuses, he is liable to a penalty, by 43 G. 3, c. 126, s. 4, 5.

Tender, evidence on replication.] The plaintiff may reply that before tender made, he issued a writ. 1 *Saund.* 33, *b* (*n*). So he may reply a prior or subsequent demand and refusal. Such demand must be proved to be of the precise sum tendered. *Rivers v. Griffiths*, 5 *B. and A.* 630. The demand must be by a person authorised to receive the money, and therefore a demand by the clerk of the plaintiff's attorney is insufficient. *Coore v. Callaway*, 1 *Esp.* 115. A subsequent demand upon one of two joint debtors is sufficient. *Peirse v. Bowles*, 1 *Stark.* 323. A letter written by the plaintiff's attorney, and received

by the defendant, demanding the sum tendered, is not, as it seems, sufficient evidence of a subsequent demand; for at the time of the demand, the defendant should have an opportunity of paying the sum demanded. *Edwards v. Yates, R. and M.* 360; *but see Haywood v. Hague,* 4 *Esp.* 93.

CASE FOR NUISANCE.

In an action on the case for a nuisance affecting real property, the plaintiff must prove his title to the property affected by the nuisance if traversed by the pleadings, the nuisance occasioned by the defendant, and the amount of damage.

Proof of plaintiff's title.] It is sufficient for the plaintiff to prove, as alleged in the declaration, that he was *possessed* of the premises injured by the nuisance. The right to incorporeal hereditaments is frequently proved by presumptive evidence of enjoyment for upwards of twenty years, *see ante p.* 19. And now by statute 2 and 3 W. 4, c. 71, the right becomes indefeasible after certain periods, *vide ante p.* 23. Where it was alleged that by reason of his possession of a mill, the plaintiff was entitled to the use of a watercourse, it was held that such allegation was not supported by evidence of a parol licence or agreement, by which the defendant permitted the exercise of the right in question to the plaintiff, but did not legally grant or annex it to the mill. *Fentiman v. Smith,* 4 *East,* 107. *Hewlins v. Shippam,* 5 *B. and C.* 221. In an action against a stranger for disturbing the plaintiff in the possession of a pew, it is not necessary for the plaintiff to prove repairs, though it is otherwise where the action is against the ordinary. *Kenrick v. Taylor,* 1 *Wils.* 326. If the nuisance be of a permanent nature, and injurious to the reversion, an action may be brought by the reversioner, as well as by the tenant in possession, each being entitled to recover his respective loss. *Biddlesford v. Onslow,* 3 *Lev.* 209, 1 *Saund.* 322, *b* (*n*). So the reversioner may sue where the injury complained of is an injury to his right, though the nuisance is capable of being easily removed. *Shadwell v. Hutchinson, M. and M.* 350. If any thing is done to destroy the evidence of title, an action is maintainable by the landlord against his tenant. *Young v. Spencer,* 10 *B. and C.* 152. But not against a stranger for a mere trespass, though it be a claim of right, as claiming a way, such an act during the tenancy not being injurious to the reversion. *Baxter v. Taylor,* 4 *B. and Ad.* 72, 1 *Nev. and M.* 11. In an action by the reversioner the tenant is a competent witness to prove the injury. *Doddington v. Hudson,* 1 *Bingh.* 257. Where he held under a written

agreement, the court of Common Pleas were divided on the question, whether it was necessary that the agreement should be produced to prove the fact of the tenancy. *Strother v. Barr*, 5 *Bingh.* 136. But, in an action for an injury to the reversion, in cutting down a tree, the tenant holding under a written agreement, the court of King's Bench held that it was necessary to produce the agreement. *Cotterill v. Hobby*, 4 *B. and C.* 465, 1 *Mann. and R.* 444 (*n*).

In an action by a reversioner, a trustee, proof that the *cestui que trust* let the premises and received rent from the tenant, is sufficient to support a count stating that the premises were in the occupation of the tenant, as tenant to the plaintiff. *Vallance v. Savage*, 7 *Bingh.* 595.

Proof of the nuisance.] The plaintiff must prove an injury amounting in law to a nuisance. It is a nuisance to build a house overhanging the house of another, whereby the rain falls upon the latter house. *Baten's case*, 9 *Rep.* 53, *b*. So if a lessee overcharges his room with weight, whereby it falls into the cellar of the plaintiff beneath. *Edwards v. Halinder*, 2 *Leon*. 93. So the erection of any thing offensive, as a swine-stye or lime-kiln, near the plaintiff's house, is a nuisance. *Aldred's case*, 9 *Rep*. 59, *a*. But for such things as merely abridge the gratification of the plaintiff in the enjoyment of his property, as shutting out the prospect from his windows, an action will not lie; *Id*. 58, *b*; and where the plaintiff brought his action against the defendant for keeping his dogs so near the plaintiff's house, that his family were prevented from sleeping during the night, and were much disturbed during the day, and the jury found a verdict for the defendant, though no evidence was given by him, the court refused to grant a new trial. *Street v. Tugwell*, *Selw. N. P.* 1047. Nor can an action be maintained for the reasonable use of a person's rights, though it be to the annoyance of another, as if a butcher, brewer, &c. use his trade in a convenient place. *Com. Dig. Action on the case for nuisance* (*C*). *See R. v. Watts*, *M. and M.* 281, *R. v. Cross*, 2 *C. and P.* 483. So an action for a nuisance to a house cannot be maintained for that which was no nuisance, before a new window was opened by the plaintiff, and which became a nuisance only by that act. *Lawrence v. Obee*, 3 *Campb.* 514.

An action does not lie against a man for pulling down his house, whereby the adjoining house falls for want of shoring. *Peyton v. Mayor of London*, 9 *B. and C.* 725. So the possessor of a house, which is not ancient, cannot maintain an action against the owner of the adjoining land for merely digging away that land, so that the house falls in, no negligence appearing. *Wyatt v. Harrison*, 3 *B. and Ad.* 871. But though the owner of the house injured neglects to shore it up, yet, if the de-

fendant pulls down his house in a wasteful, negligent, and improvident manner, so as to occasion greater risk to the owner of the adjoining house, than in the ordinary course of doing the work he would have incurred, the defendant is liable. *Walters v. Pfeil, M. and M.* 365; *and see Massey v. Goyder,* 4 *C. and P.* 161; *Brown v. Windsor,* 1 *Crom. and Jer.* 20; *Dodd v. Holme,* 1 *Ad. and Ell.* 493.

It is no nuisance merely to prevent an excess in the plaintiff's use of his right, as if A. has lights in an ancient house, and rebuilds the house, and makes lights in other places and larger; *Com. Dig. Action on the case for nuisance* (*C*); but if an ancient window is enlarged, the owner of the adjoining land cannot lawfully obstruct the passage of the light to any part of the space occupied by the ancient window, although a greater portion of light be admitted through the unobstructed part of the enlarged window than was formerly enjoyed. *Chandler v. Thompson,* 3 *Campb.* 80. A total privation of light is not necessary to maintain this action. If the plaintiff can prove that, by reason of the obstruction, he cannot enjoy the light in so free and ample a manner as he did before the injury, it is sufficient. *Cotterell v. Griffiths,* 4 *Esp.* 69. *R. v. Neil,* 2 *C. and P.* 485; *but see Back v. Stacey,* 2 *C. and P.* 465. *See also Parker v. Smith,* 5 *C. and P.* 438.

By Lord Tenterden's Act for shortening the time of prescription (2 and 3 W. 4, c. 71) it is enacted (sec. 3) that when the access and use of light to or for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding; unless it shall appear that the same was enjoyed by some consent or agreement, expressly made or given for that purpose, by deed or writing. *Vide ante p.* 24.

A., the owner of two adjoining houses, granted a lease of one of them to B. He afterwards leased the other to C., there then existing in it certain windows. After this, B. accepted a new lease of his house from A. It was held that B. could not alter his tenement, so as to obstruct windows existing in C.'s house at the time of C.'s lease from A., though the windows were not twenty years old at the time of the alteration. *Couts v. Gorham, M. and M.* 396; *and see Compton v. Richards,* 1 *Price* 27; *Riviere v. Bower, R. and M.* 24; *Swansborough v. Coventry,* 9 *Bingh.* 309.

The nuisance, occasioned by the defendant.] This action may be brought either against the person who originally occasioned the nuisance, or against his alienee, who permits it to be continued, but a request to the alienee to remove or abate the nuisance must be proved. *Penruddock's case,* 5 *Rep.* 101, *a.*

Where a notice to remove the nuisance had been served upon the predecessor of the defendant, Abbott, C. J., ruled that, being delivered on the premises to the occupier for the time being, it bound a subsequent occupier. *Salmon v. Bensley, R. and M.* 189. Where a landlord employed workmen to repair a house in the possession of his tenant, who was bound to repair, and directed the repairs, he was held answerable for a nuisance occasioned by the negligence of his workmen. *Leslie v. Pounds*, 4 *Taunt.* 649, *and see post*. But though a landlord is not liable for a nuisance created by his tenant, it is otherwise if he has let the premises with the nuisance on them and afterwards received rent; so he is liable if he lets premises, the natural consequence of the regular use of which is, that they will become a nuisance unless attended to. *Rex v. Pedley*, 3 *Nev. and M.* 627, 1 *Ad. and Ell.* 822, *S. C.* In an action for obstructing the plaintiff's lights, a clerk who superintends the erection of the building by which they are darkened, and who alone directs the workmen, is liable to be joined as a co-defendant with the original contractor. *Wilson v. Peto*, 6 *B. Moore*, 47. An action on the case, for not repairing fences, can only be maintained against the occupier, and not against the owner of the fee not in possession; *Cheetham v. Hampson*, 4 *T. R.* 318; unless the owner was bound to repair. *Payne v. Rogers*, 2 *H. Bl.* 349. *See Boyle v. Tamlyn*, 6 *B. and C.* 329. Where persons in the exercise of a public duty, as commissioners of sewers or trustees of roads, do some act within their jurisdiction, which is in fact a nuisance to the property of another, yet no action lies. *Plate Glass Co. v. Meredith*, 4 *T. R.* 794. *Harris v. Baker*, 4 *Maule and S.* 27. *Sutton v. Clarke*, 6 *Taunt.* 43. *Boulton v. Crowther*, 2 *B. and C.* 703. But if they act in an arbitrary and oppressive manner they are answerable; *Leader v. Moxon*, 3 *Wils.* 461; *Boulton v. Crowther*, 2 *B. and C.* 707; and so if they exceed the authority intrusted to them; *Boulton v. Crowther*, 2 *B. and C.* 709, 710; *Plate Glass Co. v. Meredith*, 4 *T. R.* 796; or act carelessly or negligently. *Jones v. Bird*, 5 *B. and A.* 837. *Boulton v. Crowther*, 2 *B. and C.* 711.

Defence.

The general issue, in all actions on the case since the new rules, operating only as a denial of the breach of duty or wrongful act, and not of the inducement, the latter, unless specially denied, need not be proved; (*see Dukes v. Gosling*, 1 *Bingh. N. C.* 588, 3 *Dowl. P. C.* 619, *S. C.*) " *e. g.* In an action on the case for a nuisance to the occupation of a house, by carrying on an offensive trade, the plea of *not guilty* will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's oc-

cupation of the house." *See Frankum v. Earl of Falmouth*, 4 *Nev. and M.* 333.

The defendant may show that the act complained of was done by the plaintiff's license; and if the defendant has expended money in consequence of having obtained the plaintiff's license, the latter cannot revoke the license without tendering the expenses to the defendant. *Winter v. Brockwell*, 8 *East*, 308. *Liggins v. Inge*, 7 *Bingh.* 682. *Mason v. Hill*, 5 *B. and Ad.* 15, *and see Bridges v. Blanchard*, 1 *Ad. and Ell.* 536.

If an ancient window has been completely shut up with brick and mortar above twenty years, it loses its privilege; *Lawrence v. Obee*, 3 *Camph.* 514; and where it appeared that the plaintiff's messuage was an ancient house, and that, adjoining to it, there had formerly been a building in which there was an ancient window next the lands of the defendant, and that the former owner of the plaintiff's premises, about seventeen years before, had pulled down this building, and had erected on its site another, with a blank wall next adjoining the premises of the defendant, and the latter, about three years before the commencement of the action, erected a building next to the blank wall of the plaintiff, who opened a window in that wall in the same place where the ancient window had been in the old building, it was held that he could not maintain any action against the defendant for obstructing the new window, because, by erecting the blank wall, the owner not only ceased to enjoy the right, but had evinced an intention never to resume the enjoyment. *Moore v. Rawson*, 3 *B. and C.* 332.

In actions on the case, in which the *gist* of the action is the consequential damage, the time of limitation begins to run from the time of the occurring of the consequential damage. *Roberts v. Read*, 16 *East*, 215; *and see Gillon v. Boddington*, *R. and M.* 161; *Howell v. Young*, 5 *B. and C.* 268. Where a statute directed an action to be brought within six months after the *matter* or *act done*, and the injury was sinking a sewer, whereby the walls of the plaintiff's house cracked, it was held that the action must be brought within six months from the time of the walls cracking. *Lloyd v. Wigney*, 6 *Bingh.* 489. 4 *Moore and P.* 222, *S. C.*; *see Wordsworth v. Harley*, 1 *B. and Ad.* 391.

CASE FOR DISTURBANCE OF COMMON.

In an action on the case for disturbance of common, the plaintiff must prove his right of common (if denied), the disturbance by the defendant, and the damage.

Proof of right of common.] In a declaration for an injury to

a right of common or of way, it is sufficient for the plaintiff to state a possessory title, and by Lord Tenterden's act for shortening the time of prescription, 2 and 3 W. 4, c. 71, it is enacted (sec. 5) that "in all actions upon the case and other pleadings, where the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient, and if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation." The plaintiff need not prove his title to the same extent as he has set it out in his declaration, for the disturbance is the gist of the action, and the title is only inducement. *B. N. P.* 75, 76. 1 *Saund.* 346, *a* (*n*). Thus if he states that he was possessed of a messuage, and so many acres of land, with the appurtenances, and by reason thereof ought to have common, &c., this allegation is divisible, and he may prove that he was possessed of the land only, and entitled to the common, in respect of such land. *Ricketts v. Salwey*, 2 *B. and A.* 360. An allegation of right of common for all the plaintiff's cattle, levant and couchant, is supported in evidence, although the common is not sufficient to feed all the cattle for any length of time; *Willis v. Ward*, 2 *Chitty*, 297; and an allegation of a right of common "for all commonable cattle, levant and couchant," is proved by a grant "of reasonable common of pasture." *Doidge v. Carpenter*, 6 *Maule and S.* 47. An averment that the plaintiff was entitled to common of pasture for all his cattle, levant and couchant upon his land, is supported by evidence that the plaintiff was a part owner with the defendant and others, of a common field, upon which, after the corn was reaped, and the field cleared, the custom was for the different occupiers to turn out, in common, their cattle, the number being in proportion to the extent of their respective lands within the common field, although such cattle were not maintained upon such land during the winter, and although the custom proved was to turn out according to the extent, and not to the produce of the land, in respect of which the right was claimed; and it was also held not to be necessary for the plaintiff to state his right to be with the exception of his own land, but that it was well laid to be over the whole common. *Cheesman v. Hardham*, 1 *B. and A.* 706. Where the plaintiff claimed a right of common for all his commonable cattle, and the proof was that he had turned on all the cattle he had kept, but that he never had kept any sheep, it was held that this was evidence of a right for all commonable cattle, to be left to the consideration of the jury. *Manifold v. Pennington*, 4 *B. and C.* 161.

Hearsay is admissible to prove a customary right of common, *ante p.* 28; but whether it is admissible to prove a *pre-*

scriptive right, strictly private, has been doubted. *Ibid.* A person who claims a customary right of common, is not competent to prove a right of common claimed under the same custom; but it is otherwise where the issue does not affect any common right, but is merely on a right of common claimed by prescription, *ante p.* 102.

The disturbance by the defendant.] This action is maintainable against another commoner, as well as against a stranger; *Atkinson v. Teasdale*, 2 *W. Bl.* 817; and although the plaintiff himself has been guilty of a surcharge. *Hobson v. Todd*, 4 *T. R.* 71. But in an action against the lord, the plaintiff must allege a surcharge, and prove it, by showing that there is not a sufficiency of common left for him. *Smith v. Feverell*, 2 *Mod.* 6. 1 *Saund.* 846, *b* (*n*). Where the lord has licensed a third person to put cattle on the common, the plaintiff may declare against him as a stranger for a disturbance generally; *Ibid. Hobson v. Todd*, 4 *T. R.* 73; and it will, as it seems, lie upon the defendant to prove the license, and that he has not exceeded it, but has left a sufficiency of common for the plaintiff. 1 *Saund.* 346, *b* (*new notes*).

Damage.] In an action against a stranger, the smallest damage, as carrying away the dung from the common, is sufficient to maintain the action. *Pindar v. Wadsworth*, 2 *East*, 154. So in an action against another commoner for surcharging, it is sufficient to prove that the defendant put on the common more cattle than he had a right to do, without proving any specific damage. *Hobson v. Todd*, 4 *T. R.* 71.

Defence.

As to what is admissible under the general issue, *vide ante p.* 339.

This being a possessory action, the defendant may show that the common has been inclosed and held in severalty, adversely, for upwards of twenty years, which is a bar to the entry of the commoner. *Hawke v. Bacon*, 2 *Taunt.* 156.

CASE FOR DISTURBANCE OF WAY.

In an action on the case for disturbance of way, the plaintiff must prove his right to the way as alleged in the declaration, if such right be denied by the pleadings, and the disturbance by the defendant.

Proof of the way—statute 2 and 3 W. 4, c. 71.] A very considerable change has been introduced into the law respecting the title to rights of way, by a late statute. By Lord Ten-

terden's act, 2 and 3 W. 4, c. 71, s. 3, the way having been actually enjoyed without interruption for the full period of twenty years, the right cannot be destroyed by showing that the way was first enjoyed at some time prior to the twenty years, but it may be defeated in any other way in which it was liable to be defeated at the passing of that statute, and after the way shall have been enjoyed for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed, by some consent or agreement expressly given or made for that purpose, by deed or writing.—*Vide ante*, p. 24.

Upon the construction of this statute some important decisions have already occurred.

"In order to establish a right of way and bring the case within the statute, it must be proved that the claimant has enjoyed it for the full period of twenty years, and that he has done so "as of right" for that is the form in which by the fifth section such a claim must be pleaded; and the like evidence would have been required before the statute to prove a claim by prescription or non-existing grant. Therefore if the way shall appear to have been enjoyed by the claimant, not openly, and in the manner that a person rightfully entitled would have used it, but by stealth, as a trespasser would have done; if he shall have occasionally asked the permission of the occupier of the land, no title would be acquired, because it was not enjoyed "as of right." For the same reason it would not, if there had been unity of possession, during all part of the time: for then the claimant would not have enjoyed "as of right" the *easement* but the soil itself. So it must have been enjoyed *without interruption*. Again, such claim may be defeated in any other way by which the same is now liable to be defeated, that is, by the same means by which a similar claim, arising by custom, prescription, or grant, would now be defeasible, and therefore it may be answered by proof of a grant, or of a license written, or parol, for a limited period, comprising the whole or a part of the twenty years, or of the absence or ignorance of the parties interested in opposing the claim, and their agents during the whole time that it was exercised." *Per Parke, B. delivering the judgment of the court, Bright v. Walker*, 1 *Crom. M. and R.* 219. Where, in an action of trespass, the defendants pleaded that they had for twenty years *as of right and without interruption* used, &c. a right of way, Parke, B., observed, "the issue is whether the occupiers of the closes, of right and without interruption, have had the use and enjoyment, as they insist, under this issue; therefore they must show an uninterrupted rightful enjoyment for twenty years. If they had enjoyed it for one week, and not for the next, and so on alternately, their plea would not have been proved. In the case of *Bright v.*

Walker (*supra*) lately decided in this court, it was held that the claimant must show that he has enjoyed the way for the full period of twenty years, and that he has done so, *as of right and without interruption*, and that such claim might be answered by a proof of a license, written or parol, for a limited period comprising the whole or a part of the twenty years. In the present case the permission asked for and given shows that the occupiers of the closes did not enjoy the way "as of right," "and that they also did not enjoy it uninterruptedly." Lord Lyndhurst, C. B., also in the same case said, "the simple issue is, whether there has been a continued enjoyment of the way for twenty years, and any evidence, negativing the continuance is admissible. Every time that the occupiers asked for leave, they admitted that the former license had expired, and that the continuance of the enjoyment was broken." *Monmouth Canal Company v. Harford*, 1 *Crom. M. and R.* 631.

The following observations on the statute by Mr. Justice Patteson do not appear to be quite in accordance with those cited above:—"If there be ten years' enjoyment of a right of way, and then a cessation under a temporary agreement for another ten years, yet this may be a sufficient enjoyment of the old right for twenty years to make it indefeasible under the statute, for the agreement to suspend the enjoyment of the right, does not extinguish, nor is it inconsistent with the right. So if instead of the direct path from A. to B., another track over the plaintiff's land from A. to C., and thence to B., had been substituted by the parol agreement of the parties for an indefinite time, yet the user of the substituted line may be considered as substantially an exercise of the old right, and evidence of the continued enjoyment of it." *Per Patteson, J., Payne v. Shedden*, 1 *Moo. and Rob.* 383.

In the above-mentioned case of *Bright v. Walker*, another important point, upon the construction of the prescription act, was determined, *viz.* the extent to which an adverse user of a right of way will bind the lessee, and the reversioner of the land over which the way passes. In that case a way had been used adversely for twenty years, over land in the possession of a lessee who held under a lease for lives granted by the Bishop of Worcester, and it was held that this user gave no right as against the Bishop and did not affect the see. It was likewise held that no right was gained as against the Bishop's lessee. The grounds of this decision are fully explained by Parke, B., in delivering the judgment of the court, and are a valuable commentary on the statute. "If the enjoyment," he says, "takes place with the acquiescence or by the laches of one who is tenant for life only, the question is what is its effect according to the true meaning of the statute 3 W. 4, Will it be good to give a right against the see, and those claiming under it by

a new lease, or only against the termor and his assigns during the continuance of the term, or will it be altogether invalid? In the first place it is quite clear that no right is gained against the Bishop; whatever construction is put on the 7th section it admits of no doubt under the 8th. This section provides— (Mr. Baron Parke here read the 8th section, *vide ante p.* 25.) It is quite certain that an enjoyment of forty years instead of twenty, under the circumstances of this case, would have given no title against the Bishop, as he might dispute the right at any time within three years after the expiration of the lease; and if the lease for life be excluded from the longer period, as against the Bishop, it certainly must from the shorter. Therefore there is no doubt but that this possession of twenty years gives no title as against the Bishop, and cannot affect the right of the see. The important question is, whether this enjoyment, as it cannot give a title against all persons having estates in the *locus in quo*, gives a title as against the lessee and the defendants claiming under him, or not at all? We have had considerable difficulty in coming to a conclusion on this point, but, upon the fullest consideration, we think that no title at all is gained by an user which does not give a valid title against all and permanently affect the see. Before the statute this possession would indeed have been evidence to support a plea or claim by non-existing grant from the termor, in the *locus in quo*, to the termor under whom the plaintiff claims, though such a claim was by no means a matter of ordinary occurrence; and in practice the usual course was to state a grant by an owner in fee to an owner in fee. But since the statute such a qualified right, we think, is not given by an enjoyment for twenty years. For in the first place the statute is for shortening the time of *prescription*, and if the periods mentioned in it are to be deemed new time of prescription, it must have been intended that the enjoyment for those periods should give a good title against all, for titles by immemorial prescription are absolute and valid against all. They are such as absolutely bind the land in fee. And in the next place the statute no where contains any intimation that there may be different classes of rights qualified and absolute, valid as to some persons, and invalid as to others. From hence we are led to conclude that an enjoyment of twenty years, if it give not a good title against all, gives no good title at all; and as it is clear that this enjoyment, whilst the land was held by a tenant for life, cannot affect the reversion in the Bishop now, and is therefore not good against every one, it is not good as against any one, and therefore not against the defendant. This view of the case derives confirmation from the 7th section (*vide ante p.* 25.) which, it is to be observed, excludes, in express terms, the time that the person (who is capable of resisting the claim to the way) is *tenant for life*; and unless

the context makes it necessary for us, in order to avoid some manifest incongruity or absurdity, to put a different construction, we ought to construe the words in their ordinary sense. This construction does not appear to us to be at variance with any other part of the act nor to lead to any absurdity. During the period of a tenancy from life the exercise of an easement will not affect the fee. In order to do that there must be that period of enjoyment against an owner of the fee. The conclusion therefore to which we have arrived, is that the statute gives no right from the enjoyment that has taken place, and as section 6 forbids a presumption in favour of a claim to be drawn from a less period of enjoyment than that prescribed by the statute, and as more than twenty years is required in this case to give a right, the jury could not have been directed to presume a grant, by one of the termors to the other, by the proof of possession alone. Of course nothing that has been said by the court, and certainly nothing in the statute, will prevent the operation of an actual grant, by one lessee to the other, proved by the deed itself, or upon proof of its loss, by secondary evidence; nor prevent the jury from taking the possession into consideration, with *other circumstances*, as evidence of a grant, which they may still find to have been made if they are satisfied that *it was made in point of fact.*" 1 *Crom. M. and R.* 221.

Right of way, how proved.] If the action is brought for a nuisance in a public highway, in which the plaintiff must show that he has sustained some particular damage, the plaintiff may prove the way to be public, by evidence of common reputation. *Austin's case*, 1 *Vent.* 189. A way leading to any market-town, and common for all travellers, and communicating with any great road, is a highway; but if it lead only to a church, or house, or village, or to the fields, it is a private way. *Per Hale, C. J., ibid.* As to dedication of a way to the public, *see ante p.* 20. In a very late case, where the public had used an unpaved and unfinished street for four or five years, the court held that the jury were warranted in presuming a dedication to the public. *Jarvis v. Dean*, 3 *Bingh.* 447.

A private way may be claimed by grant, prescription, reservation, or as of necessity. An adverse user of a way for upwards of twenty years, will be evidence of a grant, *ante p.* 19. The particular description of way, as a cart-way, horse-way, or foot-way, must be proved; and evidence of a prescriptive right of way for all manner of *carriages*, does not necessarily prove a right of way for all manner of *cattle*, though it is evidence to go to the jury. *Ballard v. Dyson*, 1 *Taunt.* 279. Where, in an indictment, a way was stated to be " for all the liege subjects, &c. to go, &c. with their

horses, coaches, carts, and carriages," and the evidence was that carts of a particular description, and loaded in a particular manner, could not pass along the way, it was held to be no variance. *R. v. Lyon, R. and M.* 151. The *termini* of the way, as stated in the declaration, must be proved, and a variance will be fatal. Thus the claim of a prescriptive right of way from A. over the defendant's close unto D., is not supported, if it appear that a close, called C., over which the way once led, and which adjoins to D., was formerly possessed by the owner of close A., and was by him conveyed in fee to another, without reserving the right of way, for thereby it appears that the prescriptive right of way does not, as claimed, extend *unto D.*, but stops short at C. *Wright v. Rattray*, 1 *East*, 377. *See Simpson v. Lewthwaite*, 3 *B. and Ad.* 226, *stated, post, title,* "*Trespass.*" The plaintiff might perhaps still have had a right of way *towards*, but certainly not *unto* the *terminus*. *Per Lord Kenyon, ibid.* And where the defendant in trespass *quare clausum fregit* prescribed, in his plea, for an occupation way from his own close, "unto, through, and over the said several closes, in which, &c., to and unto a certain highway, &c., and from thence back again unto the said close of the defendant," and it appeared at the trial that one of the several intervening closes was in the possession of the defendant himself, Lord Kenyon thought the prescription negatived, and the plaintiff had a verdict; but a new trial was granted by the Court of Common Pleas. *Jackson v. Shillito, cited* 1 *East*, 381. Where the way is claimed as a way of necessity, the plaintiff must prove the grant of the land, to which the way leads, to himself, and that he has no other way to the land, except the way in question, over the grantor's close. *Clark v. Cogge, Cro. Jac.* 170.

Disturbance by the defendant.] The plaintiff must prove some disturbance by the defendant, and where the action is for a nuisance in a highway, he must show some special damage; for where the inconvenience is general only, and no particular damage has been sustained by any one individual, an action on the case cannot be supported; *Fineux v. Hovenden, Cro. Eliz.* 664; *Hubert v. Groves*, 1 *Esp.* 148; but it is sufficient to show that by the stopping of the highway, the plaintiff has been compelled to use a longer and more difficult way. *Com. Dig. Action on the case for nuisance* (*C*), *Greasly v. Codling*, 2 *Bingh.* 263.

Defence.

By the rules of H. 4 W. 4. in an action on the case for obstructing a right of way, the plea of the general issue will operate as a denial of the obstruction only, and not of the plaintiff's right of way.

The defendant may show that the way has been extinguished by an inclosure act, &c., or if the way is claimed by presumed grant, he may show that during the adverse user, the land was in the possession of a tenant, *ante p.* 21, 344. If the way is claimed as a way of necessity, he may show that the plaintiff can approach the place to which it leads, over his own land, and that consequently the way of necessity has ceased. *Holmes v. Goring*, 2 *Bingh.* 76. So he may prove that the way was only a way by sufferance, during the pleasure of himself and the plaintiff, *see Reignolds v. Edwards, Willes*, 282, as evidence of which, he may show that he has kept a gate, &c., across the road, or that the plaintiff has paid him a compensation for the use of the way. The defendant may also show that the right of way has been renounced and abandoned by the party acquiescing in an obstruction for more than twenty years. *Bower v. Hill*, 1 *Bingh. N. C.* 553. But where a party was entitled to pass along a navigable drain from his land to the river, and the owner of the land lower down erected a permanent obstruction across the drain, it was held that the circumstance of part of the drain having been impassable for sixteen years, from an accumulation of mud, did not deprive the party of his right to sue for such obstruction. *Ibid.*

Unity of possession is also an extinguishment of a right of way; but where the party has different estates in the two pieces of land, as an estate in fee in the land over which, and a term of years in the land in respect of which the way exists, the easement is suspended only, and not extinguished. *Thomas v. Thomas*, 2 *Crom. M. and R.* 34.

CASE FOR NEGLIGENCE.

In an action on the case for negligence, the plaintiff must prove the defendant's liability, if denied by the pleadings, the negligence, and the damage sustained.

Defendant's liability, in case of negligent driving, &c.] In general where a servant is guilty of negligence in driving his master's carriage, the latter is answerable in an action on the case, and an allegation that the defendant negligently drove, &c. is supported by evidence that his servant was the driver; *Brucker v. Fromont*, 6 *T. R.* 659; but a master is not answerable for the wilful and malicious act of his servant. *M'Manus v. Cricket*, 1 *East*, 106. Thus where the defendant's servant wantonly, and not for the purpose of executing his master's orders, strikes the plaintiff's horses, and thereby produces the accident, the master is not liable; but where in the course of his employment he so strikes, although injudiciously, his

master is liable. *Croft v. Alison*, 4 *B. and A.* 590. So even where the master of a ship was on board at the time when an injury was done to another ship by the wilful misconduct of a sailor, he was held not to be liable. *Bowcher v. Noidstrom*, 1 *Taunt.* 568. Where A. and B. were jointly interested in the profits of a common stage waggon, but by a private agreement between themselves, each undertook the management of the waggon, with the driver and horses, for specified distances, it was held by Gibbs, C. J., that they were, notwithstanding this private agreement, jointly responsible to third persons for the negligence of their drivers throughout the whole distance; and that an averment that the negligence was occasioned by the driver of A. (against whom alone the action was brought) was supported by proof that the driver was actually employed by B. in conducting the waggon for his own stages. *Waland v. Elkins*, 1 *Stark.* 272; *see Fromont v. Coupland*, 2 *Bingh.* 170. Where a stable-keeper let four horses to a person, to draw his carriage to Epsom, and the horses were driven by the servant of the stable-keeper, Lord Ellenborough was of opinion that the latter was liable for any accidents occasioned by the post-boy's misconduct on the road; *Dean v. Branthwaite*, 5 *Esp.* 35; *Sammell v. Wright*, *id.* 263; *Sir H. Houghton's case, coram Ld. Ellenb. cited* 5 *B. and C.* 550, *S. P.*; and where the owner of a carriage hired of a stable-keeper a pair of horses to draw it for the day, and the owner of the horses provided a driver, who received no wages, but a gratuity from the owner of the carriage, and who was guilty of negligent driving, it was held by Abbott, C. J., and Littledale, J., that the owner of the carriage was not liable to be sued for such negligence; Bayley and Holroyd, J. J., *diss. Laugher v. Pointer*, 5 *B. and C.* 547. Upon the same principle, where the owner of a carriage hired four post-horses and two postilions of a livery-stable-keeper, for the day, to take him from London to Epsom and back, and, in returning, the postilions damaged the carriage of a third person, it was held that such third person might sue the livery-stable-keeper for the damage. *Smith v. Lawrence*, 2 *Mann. and R.* 1; *and see Goodman v. Rennel*, 1 *Moore and P.* 241. In case for negligence against the proprietors of a stage-coach, where it appeared in evidence that one of the defendants was driving at the time when the accident happened, the jury having found that it happened through his negligent driving, it was held that the plaintiff might maintain case against all the proprietors, though he might perhaps have been entitled to sue the one who drove, in trespass. *Moreton v. Hardern*, 4 *B. and C.* 223; *and see post*, "*Trespass.*"

In order to prove the ownership of a stage-coach, it is sufficient to show the inscription on it, of the name of the party licensed to use it, 50 G. 3, c. 48, *s.* 7. *Burford v. Nelson*, 1 *B. and Ad.* 571.

In an action for negligent driving, actual negligence must be proved, and it is not sufficient merely to show an accident, unless it be of such a nature as to afford a presumption of negligence; thus proof that a stage-coach broke down, raises a presumption that the accident arose either from the unskilfulness of the driver, or the insufficiency of the coach. *Christie v. Griggs*, 2 *Campb.* 79. *Curtis v. Drinkwater*, 2 *B. and Adol.* 169. And the owner is liable for the insufficiency of the coach, although the defect be out of sight, and not discoverable upon ordinary examination. *Sharp v. Gray*, 9 *Bingh.* 457. Where a coach, which is overloaded, breaks down, the excess in the number of passengers has been held to be conclusive evidence of the accident having arisen from overloading. *Israel v. Clark*, 4 *Esp.* 259. But where the injury is the result of mere accident, no action lies; thus where the coachman was driving in the middle of the road, and not on his own side, but there were no other coaches on the road, and the horses took fright and overturned the coach, it was held to afford no evidence of negligence; *Aston v. Heaven*, 2 *Esp.* 533; *Goodman v. Taylor*, 5 *C. and P.* 410, *and see Wordsworth v. Willan*, 5 *Esp.* 273,- where the rule with regard to keeping the road is said to be, that if a carriage coming in any direction leaves sufficient room for any other carriage, horse, or passenger, on its side of the way, it is sufficient. In *Wayde v. Lady Carr*, 2 *Dowl. and R.* 256, the court said that whatever might be the law of the road, it was not to be considered as inflexible and imperative, since in the crowded streets of the metropolis, situations and circumstances might frequently arise where a deviation from what is called the law of the road would not only be justifiable but absolutely necessary. Where the defendant was driving on the wrong side of the road, which was of considerable breadth, and the plaintiff's servant, who was on horseback, without any reason, crossed over to the side on which the defendant was driving, and, on endeavouring to pass, his horse was killed, Lord Kenyon held that it was putting himself voluntarily into danger, and that the injury was of his own seeking; but the jury found a verdict for the plaintiff, which the Court of K. B. refused to disturb. *Cruden v. Fentham*, 2 *Esp.* 685. *See also Chaplin v. Hawes*, 3 *C. and P.* 554.

In a late case it was ruled that although a person is not bound to confine himself to the ordinary side of the road, yet that if he does not, he is bound to use a greater degree of care to avoid accidents than if he kept the proper side. *Pluckwell v. Wilson*, 5 *C. and P.* 375.

As to the rule for ships at sea, *vide Handasyde v. Wilson*, 3 *C. and P.* 528.

In order to subject the master to damages, it must appear that there has been something to blame on the part of his servant; and he is blamable if he has not exercised the best and

soundest judgment on the subject; if he could have exercised a better judgment than he did, the owner is liable. *Per Lord Ellenb., Jackson v. Tollet*, 2 *Stark*. 39. The coachman must have competent skill, and must use that skill with diligence; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses; a coach and harness of sufficient strength and properly made; and also with lights by night. *Per Best, C. J., Crofts v. Waterhouse*, 3 *Bingh*. 321. If the driver may adopt either of two courses, one of which is safe and the other hazardous, and he elects the latter, he is responsible for the mischief which ensues. *Mayhew v. Boyce*, 1 *Stark*. 423. If the driver of a stage-coach neglects to inform an outside passenger of his danger, where the way passes through a low archway, the owner of the coach is liable for the damage. *Dudley v. Smith*, 1 *Campb*. 167. If a passenger, in consequence of the negligence of the defendant, is placed in such a situation as obliges him to adopt the alternative of leaping from the coach, or remaining at certain peril, and he leaps, and is hurt, the defendant is liable; but it must appear that the leaping was a prudent precaution for the purpose of self-preservation. *Jones v. Boyce*, 1 *Stark*. 493. The defendant's servant who drove the carriage is not a competent witness to disprove the negligence, *ante p*. 103; and in an action for negligence in running against the plaintiff's cart with a dray, the plaintiff cannot call his servant, who drove the cart, without releasing him. *Miller v. Falconer*, 1 *Campb*. 251; *ante p*. 103.

In case for running down a ship, neither party can recover where both are in the wrong; but the plaintiff may recover, although he might have prevented the collision, provided he was in no degree in fault in not endeavouring to prevent it. *Vennall v. Garner*, 1 *Crom. and M*. 21. *And see the case of The Ligo*, 2 *Hagg. Adm*. 356. So in an action for negligent driving, if it appear that the plaintiff as well as the defendant has been guilty of negligence, the former cannot recover. *Williams v. Holland*, 10 *Bingh*. 112, 6 *C. and P*. 23, *S. C.*

Defendant's liability, in case of damage by animals.] The owner of a wild and ferocious animal, as a lion, a bear, &c. which escapes and does damage, is liable, without any proof of notice of the animal's ferocity; but where the damage is done by a domestic animal, as a bull, a dog, &c. the plaintiff must show that the defendant knew that the animal was accustomed to do mischief; *see R. v. Huggins*, 2 *Ld. Raym*. 1583; *B. N. P.* 76; and if a man keeps a dog which is accustomed to bite sheep, &c., and the owner knows it, and notwithstanding keeps

the dog still, and afterwards the dog bites a horse, this is actionable. *Per Powell, J., Jenkins v. Turner,* 1 *Ld. Raym.* 110. The harbouring a dog about one's premises, or allowing him to be or resort there, is a sufficient keeping of the dog to support this form of action. *Per Lord Tenterden, M'Kone v. Wood,* 5 *C. and P.* 2. Where the allegation in the declaration was, that the dog was accustomed to bite mankind, and that the defendant knew it, it was held by Abbott, J., that proof that the defendant had warned a person to beware of the dog lest he should be bitten, was evidence to go to the jury in support of the allegation; *Judge v. Cox,* 1 *Stark.* 285; *see* 1 *B. and A.* 623; though where it was alleged that the defendant knew that the dog was accustomed to bite sheep, the Court of King's Bench held that proof that the dog had jumped at a man, and had chased sheep, was not evidence to support the action. *Hartley v. Halliwell,* 2 *Stark.* 214, 1 *B. and A.* 620, *S. C.* So in an action for keeping a dog which bit the plaintiff, Lord Ellenborough held it not to be sufficient to show that the dog was of a fierce and savage disposition, and usually tied up by the defendant, and that the defendant had promised to make a pecuniary satisfaction to the plaintiff. *Beck v. Dyson,* 4 *Campb.* 198. It does not appear from the report of this case, whether there was an allegation that the dog was accustomed to bite mankind. *See* 2 *Stark.* 214 (*n*). Where a dog has once bit a man, and the owner having notice thereof, lets him go about, or lie at his door, an action will lie against him by a person who is bit; though it happened by such person treading on the dog's toes, for it was owing to the defendant not hanging the dog. *Smith v. Pelah,* 2 *Str.* 1264. So where the defendant's dog was reported to be mad, and the defendant tied him up, but he broke loose, and bit the plaintiff's child, who died of hydrophobia, it was held that the defendant was liable in damages to the amount of the apothecary's bill for attending the child; and Lord Kenyon admitted evidence of reports in the neighbourhood that the dog had been bitten by a mad dog, to prove the *scienter.* *Jones v. Perry,* 2 *Esp.* 482, *differently reported, Peake, Ev.* 292, *5th edit.* But if a dog, accustomed to bite, be let loose at night for the protection of the defendant's yard, and the injury arise from the plaintiff incautiously going into the yard, after it has been shut up, no action will lie. *Brock v. Copeland,* 1 *Esp.* 203. A person has a right to keep a fierce dog to protect his property, but not to place it in on the approaches to his house, so as to injure persons exercising a lawful purpose in going along those paths to the house. *Per Tindal, C. J., Sarch v. Blackburn, M. and M.* 505, 4 *C. and P.* 297, *S. C.*; *see also Blackman v. Simmons,* 3 *C. and P.* 138. The principle of these cases was discussed in *Bird v. Holbrook,* 4 *Bingh.* 628, where it was held that a per-

son who for the protection of his property sets a spring-gun without notice in a walled garden, is answerable in damages to a person, who, having climbed over the wall in search of a strayed fowl, is injured by the gun.

Defendant's liability for not inclosing cellars, &c.] Where the tenant of a house was bound to repair it, but the landlord superintended the repairs, and the cellar was left in a dangerous state and an accident happened, the landlord was held liable; *Leslie v. Pounds*, 4 *Taunt.* 649; *Payne v. Rogers*, 2 *H. Bl.* 349; so where the defendant had employed a bricklayer to make a sewer, who left it open, in consequence of which the plaintiff fell in and broke his leg, the defendant was held liable; *Sly v. Edgley*, 6 *Esp.* 6; *see* 5 *B. and C.* 559; so the occupier of a house is bound to rail in the area, and if an accident happen, it is no defence that the premises had been in the same situation for many years before the defendant came into possession of them. *Coupland v. Hardingham*, 3 *Campb.* 398.

Where A. contracted with B. to repair his (A.'s) house for a stipulated sum; and B. contracted with C. to do the work, and C. with D. to furnish the materials, and the servant of D. brought a quantity of lime to the house, and placed it in the road, by which the plaintiff's carriage was overturned, it was held that A. was liable for this damage. *Bush v. Steinman*, 1 *B. and P.* 404; *see* 4 *Maule and S.* 29; 5 *B. and C.* 560. So where an incorporated water-works company contracted with certain pipe-layers to lay down pipes, and the pipe-layers employed workmen, by whose negligence an accident happened, Lord Ellenborough held the company liable. *Matthews v. West London Water-works Co.*, 3 *Campb.* 403; *and see Weld v. Gas-Light Co.*, 1 *Stark.* 189; *and Henley v. Mayor of Lynn*, 5 *Bingh.* 91.

Defendant's liability—innkeeper.] The liability of an innkeeper very closely resembles that of a carrier. He is *primâ facie* liable for any loss not occasioned by the act of God or the king's enemies, though he may be exonerated where the guest chooses to have the goods under his own care. *Per Bayley, J., Richmond v. Smith*, 8 *B. and C.* 11. He is liable for money as well as goods. *Kent v. Shuckard*, 2 *B. and Ad.* 803. *Dorman v. Jenkins*, 4 *Nev. and M.* 170. Where a traveller desired to have his luggage taken into the commercial room, whence it was stolen, it was held that the innkeeper was liable, though he proved that according to the usual practice of his house, the luggage would have been carried into the traveller's bed-room, if no order had been given. *Ibid.* But where a traveller engaged a private room for the purpose of showing his goods, and was told that there was a key in the door, it was held that as he had taken the goods under

his own custody, the innkeeper was not liable. *Burgess v. Clements*, 4 *Maule and S.* 306. An innkeeper, on a fair day, placing a gig belonging to a guest in the open street, where on such occasions he was accustomed to place carriages, is liable in case the gig is stolen. *Jones v. Tyler*, 1 *Ad. and Ell.* 522.

Defence.

As to what is admissible under the general issue, *vide ante p.* 339.

In an action against coach proprietors for negligence, the defendants may show that the damage was occasioned by mere accident; *vide supra, and Crofts v. Waterhouse*, 3 *Bingh.* 321; *Lack v. Seward*, 4 *C. and P.* 106; and where the plaintiff rests his case on the presumption of negligence, arising from the fact of the coach breaking down, the defendant may show that the coach was examined a few days before the accident, and no flaw discovered; and that the coachman, a skilful driver, was driving in the usual track and at a moderate pace. *Christie v. Griggs*, 2 *Campb.* 81. Where an injury arises from an obstruction in a highway, the defendant may prove that the plaintiff, by using common and ordinary caution, might have avoided it. *Butterfield v. Forrester*, 11 *East*, 60. So the defendant may show that the immediate and proximate cause of the injury, was the unskilfulness or negligence of the plaintiff. *Flower v. Adam*, 2 *Taunt.* 315; *see Cruden v. Fentham*, 2 *Esp.* 685; *Lack v. Seward*. 4 *C. and P.* 106; *Williams v. Holland*, 6 *C. and P.* 24, 10 *Bingh.* 112, *S. C., ante p.* 350; *Vennall v. Garner*, 1 *Crom. and M.* 21. In an action for negligently keeping a mischievous animal, it is a good defence that the animal was properly at large, and that the accident happened by the plaintiff's own misconduct. *Brock v. Copeland*, 1 *Esp.* 203; *see Deane v. Clayton*, 1 *B. Moore*, 225, 245.

CASE AGAINST CARRIERS.

In an action on the case against a carrier for not carrying goods safely, the plaintiff must prove the defendant's character of carrier; the delivery of the plaintiff's goods to him; that the goods were not carried safely; and the damage, or such of those parts as are denied.

The defendant's character as carrier.] The proprietors of stage coaches carrying goods; the owners and masters of vessels; *Morse v. Slue*, 2 *Lev.* 69; hoymen; *ibid.*; *Wardell v. Mourellyan*, 2 *Esp.* 693; *Maving v. Todd*, 1 *Stark*, 72; wharfingers and bargemen; *Rich v. Kneeland. Cro. Jac.* 330, are liable as common carriers. A carrier is in the nature of an insurer, and liable for every accident, except by the act of God or the king's enemies. *Per Lord Mansfield, Forward v. Pit-*

tard, 1 *T. R.* 33. He is, therefore, liable for accidental fire. *Ibid.* Where a private person undertakes the carriage of goods he is liable, not as a common carrier, but according to the terms of his contract. *Coggs v. Bernard*, 2 *Ld. Raym.* 909. If a man travel in a stage coach and take his portmanteau with him, though he has his eye on the portmanteau, yet the carrier is not absolved from his responsibility; but he will be liable if the portmanteau be lost. *Per Chambre, J., Robinson v. Dunmore*, 2 *B. and P.* 419; *see Middleton v. Fowler*, 1 *Salk.* 282; *Brook v. Pickwick*, 4 *Bingh.* 218; 12 *B. Moore*, 447, *S. C.* Where the only proof of the defendant being a carrier from London was, that he kept a booking-office, and that on a board at the door were painted the words, "Conveyances to all parts of the world," Lord Tenterden was of opinion, that this was not sufficient, there being in London booking-offices not belonging to carriers. *Upston v. Stark*, 2 *C. and P.* 598.

A stage coachman is responsible for the loss of a parcel, which he receives to carry without reward, if it is lost through gross negligence on his part. *Beauchamp v. Powely*, 1 *Moo. and Rob.* 38.

Where the contract is expressly made with the plaintiff, he need not prove that the goods are his property; but where the action is brought on the implied contract with the owner of the goods to carry them safely, the plaintiff must prove that he is owner, of which the bill of lading, if there be one, will be evidence. *Ante p.* 227. *Brown v. Hodgson*, 2 *Campb.* 36. *Dawes v. Peck*, 8 *T. R.* 330.

Evidence of the contract.] Where, in order to prove the contract, the carrier's receipt for the goods is offered in evidence, it does not require a stamp, if the carriage does not exceed 20*l.* though the value of the goods is above that sum. *Latham v. Rutley*, *R. and M.* 13.

The *termini* of the journey must be proved as laid. *Tucker v. Cracklin*, 2 *Stark.* 385. But where it was averred that the plaintiff delivered to the defendant a trunk to be put into a coach at Chester, to wit, at, &c. and safely carried to Shrewsbury, and it appeared in evidence that the trunk was delivered to the defendant at the *city of Chester*, which is a county of itself, separate from the *county* of Chester at large, but within its ambit, it was held that this was not a material variance. *Woodward v. Booth*, 7 *B. and C.* 301. And where the *terminus a quo* was stated to be *London*, Lord Tenterden held it was sufficient to prove that the coach went from a part of the town usually called London, as Piccadilly. *Beckford v. Crutwell*, 5 *C. and P.* 242, 1 *Moo. and Rob.* 187, *S. C.*

Where goods are forwarded on approval, the consignor is the proper party to sue the carrier for the loss. *Swain v. Shepherd*, 1 *Moo. and Rob.* 223. A special property is sufficient; thus a

laundress who returns clothes by a carrier, who loses them, may maintain the action. *Freeman v. Birch*, 1 *Nev. and M.* 420.

Delivery to defendant.] In an action against the proprietor of a stage coach for the loss of a parcel, it is sufficient to prove a delivery of the parcel to the driver. *Williams v. Cranston*, 2 *Stark.* 82. Unless it appear that the delivery was not in the ordinary course of business, but to the driver for his own gain. *Butler v. Basing*, 2 *C. and P.* 613. A delivery of goods on board ship must be to some officer accredited for that purpose, as to the mate. *Cobban v. Downe*, 5 *Esp.* 43. If the master receive goods at the quay or beach, or send his boat for them, the owner's responsibility commences with the receipt. *Abbott on ship.*, *citing Molloy*, *b.* 2, *c.* 2, *s.* 2. *Fragano v. Long*, 4 *B. and C.* 219. Unless it appear that the consignor does not intend to trust him with the custody, as where he is in the habit of sending his own servant in charge of the goods, who has the exclusive management of them. *East India Comp. v. Pullen*, 2 *Str.* 690. Where the only proof of delivery was, that the goods were left at an inn-yard, where the defendant and other carriers put up, it was held to be insufficient. *Selway v. Holloway*, 1 *Ld. Raym.* 46. So leaving goods at a wharf, piled up amongst other goods, without communication with any one there, is not a delivery to the wharfinger. *Buckman v. Levi*, 3 *Campb.* 414.

Proof of the loss.] It is incumbent on the plaintiff to give some evidence of negligence. *Marsh v. Horne*, 5 *B. and C.* 327. Slight evidence of the loss will be sufficient in the absence of all proof on the part of the defendant. Thus where the plaintiff's shopman was called, who stated that he did not know of the delivery, and that the parcel could not have been delivered without his knowledge, Hullock, B., held this sufficient to call on the defendants to prove a delivery. *Griffiths v. Lee*, 1 *C. and P.* 110. The declarations of a coachman, respecting the loss of a parcel, are evidence against the carrier. *Mayhew v. Nelson*, 6 *C. and P.* 58. Where the defendant has restricted his liability, by means of a notice, it may be necessary to prove gross negligence or misfeasance in the defendant. *Vide post.*

Defence.

By the new rules, H. T. 4 W. 4, the plea of *not guilty* in this action will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire; or of the purpose for which they were received.

The defendant may show that the goods did in fact arrive safe, but whether he must prove a delivery at the *residence* of

the plaintiff, seems to depend on the circumstances of each particular case. It appears that in the absence of any express contract or usage, carriers are bound to deliver the goods at the house of the consignee. *Hyde v. Trent and Mersey Navigation Co.* 5 *T. R.* 389. *Storr v. Crowley*, 1 *M'C. and Y.* 129. *Duff v. Budd*, 3 *B. and B.* 182. And if it be the carriers' course of trade to deliver goods at the consignee's residence, they are clearly bound to do so. *Golden v. Manning*, 2 *W. Bl.* 916. Where goods are conveyed by sea, it seems to be sufficient for the captain to deposit them in some place of safety and give notice to the consignee. *See Hyde v. Trent and Mersey Navigation Co.* 5 *T. R.* 398. If the carrier deliver the goods to a wrong person, he is liable in trover. *Ross v. Johnson*, 5 *Burr.* 2825. *Stephenson v. Hart*, 4 *Bingh.* 483, *post.*

Proof of notice restricting liability.] Carriers *by land* cannot now avail themselves of the defence of a notice restricting their liability; *post, p.* 360, but other carriers may. In order to affect the plaintiff with such notice, the defendant may show that it was affixed in a conspicuous situation, in the office to which the goods were brought by the plaintiff or his servant; *Leeson v. Holt*, 1 *Stark.* 186; provided the servant can read. *Davis v. Willan*, 2 *Stark.* 279. And if the servant who carried the goods to the office did not in fact read the notice, it will be no evidence of the notice. *Kerr v. Willan*, 2 *Stark.* 53; *and see Brooke v. Pickwick*, 4 *Bingh.* 222. So notice may be conveyed by handbills or advertisements in newspapers, but a carrier who circulates handbills, wherein he refuses to be accountable for parcels beyond a certain value, must be taken to have expressed in such handbills all the terms of the special contract whereon he receives goods, and cannot further restrict his liability by a board in his office. *Cobden v. Bolton*, 2 *Campb.* 108. And where two notices have been given, the carrier is bound by that which is least beneficial to himself. *Munn v. Baker*, 2 *Stark.* 255. A notice stuck up at the carrier's office is not sufficient to discharge him from his common law liability, where the goods have been delivered to his carter, not at the office. *Clayton v. Hunt*, 3 *Campb.* 27. The notice in the office ought to be in such large characters that no person delivering goods there can fail to read it, without gross negligence. *Per Cur. ibid.* And therefore where a handbill on the office door stated in large characters the advantages belonging to the waggon, and in very small characters at the bottom the restrictive notice, Lord Ellenborough held it not enough to limit the defendant's liability. *Butler v. Heane*, 2 *Campb.* 415.

In order to prove that the plaintiff was acquainted with the notice, it has been customary to show that he was in the habit of reading the newspaper in which it was inserted. *Leeson v.*

Holt, 1 *Stark.* 186. But it is not sufficient to prove that the notice was inserted in a paper which circulates in the place in which the party lives; some proof must be given that he took in the newspaper in question. *Proprietors of Norwich Navigation v. Theobald, M. and M.* 153; *and see Boydell v. Drummond*, 11 *East*, 144 (*n*). Where the advertisement had been inserted in the Gazette, but there was no proof that the plaintiff read the Gazette, Lord Ellenborough in one case said he would receive the evidence, but that unless it were proved that the party was in the habit of reading the Gazette, it would be of little avail. *Ibid.* However, in a subsequent case the same judge was of opinion that this evidence could not be received without proof of the plaintiff's having read the Gazette, since he might be expected to look into the Gazette for notices of dissolution of partnership, but not for notices by carriers. *Munn v. Baker*, 2 *Stark.* 255. In a later case, where it was proved that the plaintiff had taken in, for three years, a weekly newspaper, in which the defendant's restrictive notice had been always advertised, and the jury, notwithstanding, found a verdict for the plaintiff, the Court of Common Pleas thought the verdict perfectly right, and that it could not be intended that a party read all the contents of any newspaper he might chance to take in. They said that carriers who wished, by means of notice, to divest themselves of a common law responsibility, were bound to fix upon their employers a knowledge of such notice, and that they might easily do so by delivering to every person, who brought a parcel for conveyance, a printed paper containing the notice; and a new trial was refused. *Rowley v. Horne*, 3 *Bingh.* 2. So the defendant may bring home the notice to the plaintiff by showing that when *other* parcels were delivered to him a ticket was also delivered, containing the notice. *Mayhew v. Eames*, 3 *B. and C.* 603.

To prove the contents of a notice painted on a board inlaid in the wall, an examined copy is sufficient. *Cobden v. Bolton*, 2 *Campb.* 108.

It does not destroy the operation of a notice restraining the liability of the defendants to 5*l.* unless the goods be entered and paid for accordingly, that the goods were known to the carrier to be of greater value, and that the additional rate of carriage was not demanded by him; *Marsh v. Horne*, 5 *B. and C.* 322; *Levi v. Waterhouse*, 1 *Price*, 280; nor that on occasion of other losses the carrier made allowances to the plaintiff for damage, without inquiring into the cause of such damage. *Evans v. Soule*, 2 *Maule and S.* 1. Though the notice will be inoperative in case the carrier has been guilty of negligence. *Garnett v. Willan*, 5 *B. and A.* 53. *Sleat v. Fagg*, 5 *B. and A.* 342. *Duff v. Budd*, 3 *B. and B.* 177. But the plaintiff will not be allowed to complain of any negligent performance of

the contract by the carrier, where that negligence has been occasioned by the plaintiff's own act, as by his treating the parcel as a thing of no value. *Per Abbott, C. J., Sleat v. Fagg*, 5 *B. and A.* 347. *Batson v. Donovan*, 4 *B. and A.* 21. Thus where the plaintiff sent a parcel of value by the defendant's coach, using an artifice to disguise the value [200 sovereigns inclosed in 6lbs. of tea], and the parcel was stolen by the defendant's servants, it was held that the plaintiff could not recover. *Bradley v. Waterhouse, M. and M.* 154.

Statute 1 *W.* 4, *c.* 68.] Great alterations have been introduced with regard to the responsibility of land carriers by the 1 W. 4, c. 68 (commencing 23d July, 1830), reciting that by reason of the frequent practices of bankers and others of sending by the public mails, stage-coaches, waggons, vans, and other public conveyances by land for hire, parcels and packages containing money, bills, notes, jewellery, and other articles of great value in small compass, much valuable property is rendered liable to depredation, and the responsibility of mail contractors, stage-coach proprietors, and common carriers for hire, is greatly increased: and that through the frequent omission by persons sending such parcels and packages to notify the value and nature of the contents thereof, so as to enable such mail contractors, stage-coach proprietors, and other common carriers, by due diligence, to protect themselves against losses arising from their legal responsibility, and the difficulty of fixing parties with knowledge of notices published by such mail contractors, stage-coach proprietors, and other common carriers, with the intent to limit such responsibility, they have become exposed to great and unavoidable risks, and have thereby sustained heavy losses.

Section 1. No mail contractor, stage-coach proprietor, or other common carrier by land for hire, shall be liable for the loss of or injury to any article or articles or property of the descriptions following; (that is to say), gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or time-pieces of any description, trinkets, bills, notes of the governor and company of the banks of England, Scotland, and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes, or securities for payment of money, English or foreign, stamps, maps, writings, title deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs, or lace, or any of them, contained in any parcel or package which shall have been delivered, either to be carried for hire or to accompany the person of any passenger in any mail or stage-coach or

other public conveyance, when the value of such article or articles or property aforesaid contained in such parcel or package shall exceed the sum of ten pounds, unless at the time of the delivery thereof at the office, warehouse, or receiving house of such mail contractor, stage-coach proprietor, or other common carrier, or to his, her, or their book-keeper, coachman, or other servant, for the purpose of being carried or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package.

Section 2. When any parcel or package containing any of the articles above specified shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed the sum of ten pounds, it shall be lawful for such mail contractors, stage-coach proprietors, and other common carriers, to demand and receive an increased rate of charge, to be notified by some notice affixed in legible characters in some public and conspicuous part of the office, warehouse, or other receiving house where such parcels or packages are received by them for the purpose of conveyance, stating the increased rates of charge required to be paid over and above the ordinary rate of carriage, as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles; and all persons sending or delivering parcels or packages, containing such valuable articles as aforesaid, at such office, shall be bound by such notice, without further proof of the same having come to their knowledge.

Section 3. Provided always, that when the value shall have been so declared, and the increased rate of charge paid, or an engagement to pay the same shall have been accepted as hereinbefore mentioned, the person receiving such increased rate of charge or accepting such agreement shall, if thereto required, sign a receipt for the package or parcel, acknowledging the same to have been insured, which receipt shall not be liable to any stamp duty; and if such receipt shall not be given when required, or such notice as aforesaid shall not have been affixed, the mail contractor, stage-coach proprietor, or other common carrier as aforesaid shall not have or be entitled to any benefit or advantage under this act, but shall be liable and responsible as at the common law, and be liable to refund the increased rate of charge.

Section 4. Provided always, that from and after the first day of September now next ensuing, no public notice or declaration heretofore made or hereafter to be made shall be deemed or construed to limit or in anywise affect the liability at common law of any such mail contractors, stage-coach proprietors, or

other public common carriers as aforesaid, for or in respect of any articles or goods to be carried and conveyed by them; but that all and every such mail contractors, stage-coach proprietors, and other common carriers as aforesaid, shall from and after the said first day of September be liable, as at the common law, to answer for the loss of or injury to any articles and goods in respect whereof they may not be entitled to the benefit of this act, any public notice or declaration by them made and given contrary thereto, or in anywise limiting such liability notwithstanding.

Section 5. That for the purposes of this act every office, warehouse, or receiving house, which shall be used or appointed by any mail contractor or stage-coach proprietor or other such common carrier as aforesaid for the receiving of parcels to be conveyed as aforesaid, shall be deemed and taken to be the receiving house, warehouse, or office of such mail contractor, stage-coach proprietor, or other common carrier; and that any one or more of such mail contractors, stage-coach proprietors, or common carriers, shall be liable to be sued by his, her, or their name or names only; and that no action or suit commenced to recover damages for the loss or injury to any parcel, package, or person, shall abate for the want of joining any co-proprietor or co-partner in such mail, stage-coach, or other public conveyance by land for hire as aforesaid.

Section 6. Provided always, that nothing in this act contained shall extend or be construed to annul or in anywise affect any special contract between such mail contractor, stage-coach proprietor, or common carrier, and any other parties, for the conveyance of goods and merchandises.

Section 7. Provided also, that where any parcel or package shall have been delivered at any such office, and the value and contents declared as aforesaid, and the increased rate of charges been paid, and such parcels or packages shall have been lost or damaged, the party entitled to recover damages in respect of such loss or damage shall also be entitled to recover back such increased charges so paid as aforesaid, in addition to the value of such parcel or package.

Section 8. Provided also, that nothing in this act shall be deemed to protect any mail contractor, stage-coach proprietor, or other common carrier for hire, from liability to answer for loss or injury to any goods or articles whatsoever arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his or their employ, nor to protect any such coachman, guard, book-keeper or other servant, from liability for any loss or injury occasioned by his or their own personal neglect or misconduct.

Section 9. Provided also, that such mail contractors, stage-coach proprietors, or other common carriers for hire, shall not be concluded as to the value of any such parcel or pack-

age by the value so declared as aforesaid, but that he or they shall in all cases be entitled to require, from the party suing in respect of any loss or injury, proof of the actual value of the contents by the ordinary legal evidence, and that the mail contractors, stage-coach proprietors, or other common carriers as aforesaid, shall be liable to such damages only as shall be so proved as aforesaid, not exceeding the declared value, together with the increased charges before mentioned.

Section 10. That in all actions to be brought against any such mail contractor, stage-coach proprietor, or other common carrier as aforesaid, for the loss of or injury to any goods delivered to be carried, whether the value of such goods shall have been declared or not, it shall be lawful for the defendant or defendants to pay money into court in the same manner and with the same effect as money may be paid into court in any other action.

Upon the construction of the above act, it has been held, that it extends to all the articles enumerated in the 1st section, although not within the words of the preamble, "an article of great value in small compass." To entitle a party to recover for loss or injury to any article of such description, he must give express notice to the carrier of the value and nature of the article. A looking glass, exceeding the value of 10*l*., was packed up in a case and sent to the carrier's office to be conveyed from London to the house of S. near Lymington. A notice was fixed up in the office, pursuant to the second section of the statute. The words "plate glass," "looking glass," "keep this edge upwards," were written on the case, but no declaration was made of the nature and value of the article, and no increased rate of carriage paid. The parcel was conveyed from Lymington to the place of its ultimate destination on a brewer's truck, that being the usual mode in which parcels were conveyed in that part of the country. When the glass was unpacked it was found to be broken. It was held, that the carrier was not liable for the damage occasioned by the breaking of the glass. *Quære*, Whether the carrier would have been liable if he had been guilty of gross negligence. *Owen v. Burnett*, 2 *Crom. and M.* 353; 4 *Tyr.* 133, *S. C.*

CASE FOR DEFAMATION.

In an action on the case for slander or libel, the plaintiff must formerly have proved, under the general issue, the speaking of the words or the publication of the libel, the innuendos, the introductory averments essential to his case, the malice of the defendant in certain cases, and the damage sustained. But

now by the rules of H. T. 4 W. 4, the plea only puts in issue the publication of the libel; but in an action of slander of the plaintiff in his office, profession, or trade, the plea of not guilty will operate to the same extent precisely as at present in denial of speaking the words, of speaking them maliciously, and in the sense imputed, and with reference to the plaintiff's office, profession, or trade, but it will not operate as a denial of the fact of the plaintiff holding the office or being of the profession or trade alleged.

Proof of the speaking the words.] Though the plaintiff need not prove the speaking of all the words laid in the declaration, yet it is necessary to prove some material part of them, and it is not sufficient to prove equivalent words of slander. *Per Lawrence, J., Maitland v. Goldney*, 2 *East*, 434. Thus a statement of words spoken affirmatively is not supported by proof of words spoken by way of interrogation. *Barnes v. Holloway*, 8 *T. R.* 150. *B. N. P.* 5. Where the declaration avers that the defendant spoke certain words, it must be taken to mean that he used them as his own words, and if he repeated them as the words of another, it is a variance. *M'Pherson v. Daniels*, 10 *B. and C.* 274. *Bell v. Byrne* 13 *East*, 554. Where the words laid were, "*This* is my umbrella, and he stole it from my back door," and the words proved, "*It* is my umbrella," &c. it was held a variance, the word *this* importing that the umbrella was present (which in fact it was not). *Walters v. Mace*, 2 *B. and A.* 756. Where all the words constitute one charge, they must be all proved. Thus where the words laid were, "He is selling coals at one shilling a bushel to pocket the money, and become a bankrupt to cheat his creditors," and the words "and become a bankrupt" were not proved, Eyre, C. J., held that the words constituted one general charge, and that the variance was fatal. *Flower v. Pedley*, 2 *Esp.* 491. But where the words omitted to be proved do not qualify or affect those proved, the omission is immaterial. Thus, where the words stated were "'Ware Hawk; you must take care of yourself there; mind what you are about:" and the plaintiff failed to prove the words "Mind what you are about;" the variance was held immaterial. *Orpwood v. Barkes*, 4 *Bingh.* 261; *see also Rutherford v. Evans*, 6 *Bingh.* 451. Words laid as spoken in English are not proved by evidence of words spoken in a foreign language. *Zenobio v. Axtell*, 6 *T. R.* 162.

Proof of the libel.] A mere omission in setting out part of a libel is not fatal, unless the sense of that which is set out is thereby varied. *Tabart v. Tipper*, 1 *Campb.* 353; *see* 5 *B. and A.* 617. But where a libellous paragraph contained two references, by which the words appeared to be in fact the language

of a third person, speaking of the plaintiff's conduct, and those references were omitted in the declaration, it was held that the omission altered the sense of the passage, and that the variance was fatal. *Cartwright v. Wright*, 5 *B. and A.* 615; *see R. v. Solomon, R. and M.* 253. And where the words laid were, "My sarcastic friend, by leaving out the repetition, &c." and those proved were, "my sarcastic friend ΜΩΡΟΣ, by leaving out," &c. Lord Ellenborough held the variance fatal. *Tabart v. Tipper*, 1 *Campb.* 353. Where the omission or addition of a letter does not change the word so as to make it another word, the variance is not material. *Per Ld. Mansfield, Beech's case*, 1 *Leach*, 159, *3rd ed.* Thus, "undertood," for "understood," is no variance. *Ib. case of indictment for perjury.* "I cannot answer for the cleanliness of her person, because she takes snuff," the words being "I cannot answer, &c. because *I believe* she takes snuff," was held a variance. *Cook v. Stokes*, 1 *Moo. and Rob.* 237. So where the libel on the record imputed to the plaintiff, an engineer, "mismanagement or ignorance," and the words proved were, "ignorance or inattention," this was held a fatal variance. *Brooks v. Blanshard*, 1 *Crom. and Mee*, 779; 3 *Tyr.* 844, *S. C.* An allegation that the defendant said of the plaintiff, "she secreted 1*s*. 6*d*. under the till, stating these are not times to be robbed," was held to import that the plaintiff, when secreting the 1*s*. 6*d*. had used the latter words, and that therefore the allegation did not contain that which was actionable *per se*, so as to disentitle the plaintiff to full costs, where the verdict was under 40*s*. *Kelly v. Partington*, 2 *Nev. and M.* 460.

Proof of publication of libel.] Proof that the libel produced is in the defendant's handwriting, is said to be presumptive evidence of publication, so as to throw the proof of non-publication upon him. *R. v. Beare*, 1 *Ld. Raym.* 417. *Lamb's case*, 9 *Rep.* 59, *b.* So printing a libel, unless qualified by circumstances, shall *primâ facie* be understood to be a publishing, for it must be delivered to the compositor, and the other subordinate workmen. *Per Cur. Baldwin v. Elphinstone*, 2 *W. Bl.* 1038. A written libel may be published in a letter to a third person; *per Cur. ibid.*, but the publication of a libellous letter to the plaintiff himself, though it may be the subject of an indictment, is not such a publication as to maintain an action. *Phillips v. Jansen*, 2 *Esp.* 624. But where the libel was contained in a letter sent by the defendant to the plaintiff, proof that the defendant knew that letters sent to the plaintiff were usually opened by his clerk, is evidence to go to a jury of the defendant's intention that the letter should be read by a third person, so as to amount to a publication. *Delacroix v. Thevenot*, 2 *Stark.* 63. A letter, containing a libel, was proved to be in the handwriting of the defendant, to have been addressed to a

party in Scotland, to have been received at the post-office at C. from the post-office at H., and to have been then forwarded from C. to London, to be forwarded to Scotland, and it was produced at the trial with the proper post marks, and with the seal broken; this was held sufficient evidence that it had reached the person to whom it was addressed, and of a publication to him. *Warren v. Warren*, 1 *Crom. M. and R.* 250. It was ruled by Lord Ellenborough, that where a person who has a copy of a libellous caricature, shows it to another, at his request, it is not sufficient evidence of publication to support an action. *Smith v. Wood*, 3 *Campb.* 323, *sed quære.* The delivery of a libellous pamphlet by the governor of a colony to his attorney general, not for any official purpose, is a publication. *Wyatt v. Gore, Holt*, 299. The sale of a libel in the defendant's shop by his servant or agent there, for the defendant's benefit, is a publication by the defendant, though he was not privy to the contents or sale. *Com. Dig. Libel* (*B.* 1). The delivery of a newspaper to the officer at the stamp office, is a sufficient publication to sustain an indictment for a libel in that paper. *R. v. Amphlitt*, 4 *B. and C.* 35. So proof that the defendant accounted with the officer of stamps for the duty on advertisements in the paper in question is evidence of publication. *Cook v. Ward*, 6 *Bingh.* 409. Evidence that the libel was written by the defendant's daughter, who was authorised to make out his bills and write his general letters of business, is not sufficient to charge the defendant, unless it can be shown that such libel was written with the knowledge or by the procurement of the defendant. *Harding v. Greening*, 1 *B. Moore*, 477. In order to show that the defendant had caused a printed libel to be inserted in a newspaper, a reporter to the paper was called, who proved that he had given a written statement to the editor of the newspaper, the contents of which had been communicated by the defendant for the purpose of such publication, and that the newspaper produced was exactly the same, with the exception of one or two slight alterations not affecting the sense; it was held that what the reporter published might be considered as published by the defendant, but that the newspaper could not be read in evidence, without producing the written statement delivered by the witness to the editor. *Adams v. Kelly, R. and M.* 157. Where a letter (whether sealed or not there was no direct proof) was put into the post-office in the county of L., it was held by the court of K. B. (*Bayley, J., dub.*) that it was a publication in L. *R. v. Burdett*, 4 *B. and A.* 95. *R. v. Watson*, 1 *Campb.* 215.

Where a libel has been printed by the defendant's order, and he has taken away some of the impressions, one of those left with the printer may be read in evidence. *R. v. Watson*, 2 *Stark.* 129. The sale of each copy of a printed libel is a distinct publication. *R. v. Carlisle*, 1 *Chitty*, 451.

The publication of the libel may likewise be proved by the admission of the defendant. Where the defendant admitted that he was the author of a printed libel, "Errors of the press and some small variances only excepted," it was objected that this not being an absolute admission, was not evidence of publication, but Pratt, C. J., received, saying he would put it to the defendant to prove material variances. *Rex v. Hall*, 1 *Str.* 416. An admission of being the publisher of a periodical work, does not extend beyond the date of such admission. *Macleod v. Wakley*, 3 *C. and P.* 311.

The proof of the publication of libels contained in newspapers is greatly facilitated by the statute 38 G. 3, c. 78, by which an affidavit or affirmation sworn by the proprietors and printers of every newspaper, or by a certain number of them, as therein directed, is to be delivered to the commissioners of the stamp duties, such affidavit to specify the names and abode of the printer, publisher, and proprietors, if they do not exceed two, exclusive of the printer and publisher, and if they do, then of two proprietors and their proportional shares, and the description of the printing-house, and the title of the paper; and by sec. 9, all such affidavits and affirmations or copies thereof, certified to be true copies, shall respectively, in all proceedings, civil and criminal, touching any newspaper, or other such paper as aforesaid, which shall be mentioned in any such affidavits or affirmations, or touching any publication, matter, or thing contained in any such newspaper, or other paper, be received and admitted as conclusive evidence of the truth of all such matters set forth in such affidavits or affirmations, as are by the said act required to be therein set forth, against every person who shall have signed, or sworn, or affirmed, such affidavits or affirmations, and shall also be received and admitted in like manner as sufficient evidence of the truth of all such matters against all and every person, who shall not have signed, or sworn, or affirmed the same, but who shall be therein mentioned to be a proprietor, printer, or publisher of such newspaper or other paper, unless the contrary shall be satisfactorily proved; provided always, that if any such person or persons respectively, against whom any such affidavit or affirmation, or any copy thereof, shall be offered in evidence, shall prove that he, she, or they hath or have signed, sworn, or affirmed, and delivered to the said commissioners, or such officer as aforesaid, previous to the day of the date or publication of the newspaper, or other such paper as aforesaid to which the proceedings, civil or criminal, shall relate, an affidavit or affirmation that he, she, or they hath or have ceased to be the printer or printers, proprietor or proprietors, or publisher or publishers of such newspaper, or other such paper as aforesaid, such person or persons shall not be deemed, by reason of any former affi-

davit or affirmation so delivered as aforesaid, to have been the printer or printers, proprietor or proprietors, or publisher or publishers of such paper, after the day on which such last-mentioned affidavit or affirmation shall have been delivered to the said commissioners or their officer as aforesaid. By sec. 11, it shall not be necessary after any such affidavit or affirmation, or a certified copy thereof, shall have been produced in evidence against the persons who signed the same, &c., or after a newspaper, or any such other paper as aforesaid, shall be produced in evidence, entitled in the same manner as the newspaper, or other paper mentioned in such affidavit or copy, is entitled, and wherein the name or names of the printer or publisher, or printers or publishers, and the place of printing, shall be the same as those mentioned in such affidavit or affirmation, for the plaintiff to prove that the newspaper, or paper, to which such trial relates, was purchased at any house, shop, or office belonging to or occupied by the defendant or defendants, or any of them, or by his or their servants or workmen, or where he or they, by themselves or their servants or workmen, usually carry on the business of printing or publishing such paper, or where the same is usually sold. By sec. 14, in all cases, a copy of any such affidavit or affirmation, certified to be a true copy under the hand or hands of one or more of the commissioners or officers in whose possession the same shall be, shall, upon proof made that such certificates have been signed with the handwriting of the person or persons making the same, and whom it shall not be necessary to prove to be a commissioner or commissioners, or officer or officers, be received in evidence as sufficient proof of such affidavit or affirmation, and that the same was duly sworn or affirmed, and of the contents thereof; and such copies, so produced and certified, shall also be received as evidence that the affidavit or affirmation, of which they purport to be copies, have been sworn or affirmed according to this act, and shall have the same effect for the purposes of evidence, to all intents whatsoever, as if the original affidavits or affirmations, of which the copies so produced and certified shall purport to be copies, had been produced in evidence, and had been proved to have been duly so certified, sworn or affirmed, by the person or persons appearing by such copy to have sworn or affirmed the same as aforesaid. By sec. 17, the printer or publisher of every newspaper, or other such paper as aforesaid, shall upon every day upon which the same shall be published, or within six days after, deliver to the commissioners of stamps at their head office, or to some officer to be appointed by them to receive the same, and whom they are hereby required to appoint for that purpose, one of the papers so published upon each such day, signed by the printer or publisher thereof, in his handwriting, with his name and

place of abode; and in case any person or persons shall make application to the commissioners, or such officer as aforesaid, in order that such newspaper, or other paper, so signed by the printer or publisher, may be produced in evidence in any proceeding civil or criminal, the said commissioners, or such officers, shall at the expense of the party applying, at any time within two years from the publication thereof, either cause the same to be produced in the court in which the same is required to be produced, and at the time when the same is required to be produced, or shall deliver the same to the party applying for it, taking, according to their discretion, reasonable security at his expense for the returning the same to the said commissioners, or such officer; and in case, by reason that the same shall have been previously required by any other person to be produced in any court, or hath been previously delivered to any other person for the like purpose, the same cannot be produced at the time required, or be delivered according to such application, in such case the said commissioners, or such officer, shall cause the same to be produced, or shall deliver the same as soon as they are enabled so to do.

Since this statute the production and proof of a certified copy of the affidavit and of a newspaper, corresponding, in the title and in the names and descriptions of printer and publisher, with the newspaper mentioned in the affidavit, will be sufficient evidence of publication. *Mayne v. Fletcher,* 9 *B. and C.* 382. *R. v. Hunt,* 31 *State Trials,* 375. But where the affidavit and the newspaper vary in the place of residence of the party it is insufficient. *Murray v. Souter, cited* 6 *Bingh.* 414. *See R. v. Francis,* 4 *Nev. and M.* 251.

Proof of introductory averment.] Where the words themselves convey an imputation of an offence as "he is a thief, and has robbed me of my bricks," no introductory averment is necessary. *Slowman v. Dutton,* 10 *Bingh.* 402; *see also Curtis v. Curtis,* 10 *Bingh.* 477. All the introductory averments essential to the plaintiff's case must be proved, when denied upon the pleadings, but if immaterial to the character of the libel itself, they need not be proved. Thus where the declaration stated that the plaintiff was an attorney, and had been employed as vestry clerk to the parish of A., and that whilst he was such vestry clerk certain prosecutions were carried on against B. for certain misdemeanors, and in furtherance of such proceedings, *and to bring the same to a successful issue*, certain sums of money belonging to the parishioners were appropriated and applied to the discharge of the expenses incurred on account of the said proceedings, yet defendant &c., intending &c., to injure the plaintiff in his profession of an attorney, and to cause him to be esteemed a fraudulent practiser

in his said profession, and in his office as vestry clerk, and to cause it to be suspected that the plaintiff had fraudulently applied money belonging to the parishioners, falsely and maliciously published, of and concerning the plaintiff, and of and concerning his conduct in his office of vestry clerk, *and of and concerning the matters aforesaid,* the libel &c., and it appeared, on the production of the libel at the trial, that the imputation was that the plaintiff had applied the parish money in payment of the expenses of the prosecution *after it had terminated,* it was held that this was no variance, because it did not alter the character of the libel, the fraud imputed to the plaintiff being the same, whether the money was misapplied before or after the proceedings had terminated. *May v. Brown,* 3 *B. and C.* 113; *and per Abbott, C. J., ibid.,* "The allegation does not compel the plaintiff to prove formally, and precisely, that the libel relates to every part and particular of the matter so previously stated, but it satisfies all he has taken upon himself to prove, if he shows that the libel relates substantially to the matters previously alleged by way of introduction, in such manner as that the defamation contained in the libel is of the character and effect which the plaintiff has described." So where the declaration stated that the plaintiff was an attorney, and that the defendant intending to injure him in his good name, and in his said profession of an attorney, published the libel of and concerning the plaintiff, *and of and concerning him in his said profession,* and the plaintiff failed in proving, that at the time of the publication of the libel he was an attorney, it was held that this was not a fatal variance, the words of the libel being actionable, though not used with reference to the professional character of the plaintiff. *Lewis v. Walter,* 3 *B. and C.* 138 (*n*); *and see Cox v. Thomason,* 2 *Crom. and J.* 361.

But where the fact stated in the introductory averment, and connected with the libel by the words "of and concerning," is material to the defamatory character of the libel itself, it must be proved as stated; though it is otherwise where the introductory words are not material. *Cox v. Thomason,* 2 *Crom. and J.* 361. Where the declaration stated in the first count, that the plaintiff, a constable, had apprehended persons stealing a dead body, and had carried the body to Surgeons' Hall, and that the defendant published the libel "of and concerning the plaintiff's said conduct;" and in the second count stated that defendant published a certain other libel "of and concerning the conduct of the plaintiff respecting the said dead body," it was held a variance upon both counts that the plaintiff did not prove that he had carried the body to Surgeons' Hall. *Teesdale v Clement,* 1 *Chitty,* 603, *and per Cur. ibid.* "The fact which has failed in proof is very material to the libel itself; for the

libel is with respect to the plaintiff's conduct to this dead body, and if the plaintiff is charged with carrying this body, amongst other places, to Surgeons' Hall, it certainly is most important to prove that part of the conduct." So in an action for words, charging the plaintiff with having stolen some soap, where the declaration alleged that the words had been spoken of and concerning certain soap which B. had asserted to have been *stolen* out of his yard, and it appeared in evidence that B. had asserted that the soap had been *taken* out of his yard, Abbott, C. J., held the variance fatal. *Shepherd v. Bliss*, 2 *Stark.* 510. Where the declaration stated that the plaintiff was treasurer and collector of certain tolls, and that the defendant spoke of and concerning the plaintiff, as such treasurer and collector as aforesaid, certain words, "thereby meaning that the plaintiff, as such treasurer and collector, had been guilty, &c.;" and the plaintiff failed to prove that he was collector, it was held that the plaintiff was bound to prove that he was both treasurer and collector; *Sellers v. Till*, 4 *B. and C.* 656, *and per Cur.*, "it appears that there is an innuendo expressly applying the words to the plaintiff in his character of *collector*, which makes the case very distinguishable from those which have been cited (*May v. Brown*, *Lewis v. Walter*, *supra*), for in them the meaning of the words was not limited by the insertion of such an innuendo." *See Heriot v. Stuart*, 1 *Esp.* 437.

Where the words are alleged to have been spoken of and concerning the plaintiff in a particular character, and are only actionable as having been spoken of the plaintiff in that character, such character must be proved; but where the words themselves admit the plaintiff's character, any further evidence of it is unnecessary. *See ante p.* 37; *and Yrisarri v. Clement*, 3 *Bingh.* 432. The first count of the declaration stated that the plaintiff had been a woolstapler at C., and a brewer at O., and that the defendant spoke of him, *as such trader as aforesaid*, the following words: "Mr. H. (the plaintiff) and Mr. B. have both been bankrupts; Mr. H. at C., &c." The second count alleged the words to have been spoken of and concerning the plaintiff *in his former trade of a woolstapler*; and the third, of and concerning the plaintiff *in his trade of a brewer*. There was no evidence of the plaintiff having been a woolstapler, but it was proved he had been a brewer at Oxford. It was objected that the proof did not support the allegation, that the words were spoken of the plaintiff in his trade of a brewer at O.; the Court of K. B. held it no variance, and *per Ld. Ellenborough*, the place where the bankrupt is stated to have become bankrupt is immaterial; he might have become bankrupt whilst a brewer at O., by an act of bankruptcy committed at C.; the substance of the words is this; he was a bankrupt at C., and so he might be whilst car-

rying on the trade of a brewer at O. *Hall v. Smith*, 1 *Maule and S.* 287. So where the declaration alleged that the plaintiff, at the time of the speaking of the words, was a carpenter and sworn appraiser; and that the defendant, intending to injure him in his several trades as aforesaid, and to prevent persons from employing him in his several trades as aforesaid, in a certain discourse of and concerning the plaintiff in his *trade of a carpenter*, spoke the words; and there was no proof that the plaintiff carried on the trade of a sworn appraiser, it was held no variance. *Figgins v. Cogswell*, 3 *Maule and S.* 369. *See also Rutherford v. Evans*, 6 *Bingh.* 451.

To prove that the plaintiff is a physician, it is not sufficient to produce a diploma of Doctor of Physic under the seal of one of the Universities, without proving the seal. *Moises v. Thornton*, 8 *T. R.* 303. To make such an instrument evidence it should be either the original act of the corporation conferring the degree, or an examined copy of it; as an original act, it should be proved that the seal affixed to it is the seal of the University; if considered as a copy, it should be compared with the original book by the witness who produces it. *Per Grose, J., ibid; ante p.* 71. To prove a degree of Doctor of Medicine in the University of St. Andrews, a sealed instrument and a written paper were produced, the former purporting to be a diploma of Doctor of Medicine. It was proved that a person at St. Andrews calling himself the University Librarian, had shown, as the University seal, in a room which he called the University Library, a seal, corresponding with that on the instrument produced. The written paper purported to be an act of the University conferring the degree. In the same room, the same person, with others calling themselves professors of the University, had shown, as the book of acts of the University, a book containing an entry agreeing with the written paper. This was held to be sufficient proof of the validity of the diploma. *Collins v. Carnegie*, 1 *Ad. and Ell.* 695, 3 *Nev. and M.* 703, *S. C.* An averment that the plaintiff practised as a physician in England, is not supported by evidence that he practised under a Scotch diploma. *Ibid.* As to proof of being *an apothecary, vide ante p.* 254. The books of an University, conferring the degree of Doctor of Laws, are evidence to prove that fact. 8 *T. R.* 306.

In order to prove that the plaintiff is an attorney, an examined copy of the roll of attornies, signed by the plaintiff, is sufficient. So the book from the master's office containing the names of all the attornies, produced by the officer in whose custody it is kept, is good evidence, together with proof that the plaintiff practised as an attorney at the time of the words spoken. *R. v. Crossley*, 2 *Esp.* 526. *Lewis v. Walter*, 3 *B. and C.* 138. *Jones v. Stevens*, 11 *Price*, 251. And the stamp-office certificate, countersigned by the master of the Court of

King's Bench, is sufficient *primâ facie* evidence of the party being an attorney of that court. *Sparling v. Heddon*, 9 *Bingh.* 11. Where the title to the particular situation is not the subject of any express documentary appointment, the acting in the situation is of course the only evidence which the fact admits of. 2 *Stark. Ev.* 860, 1*st ed*. In an action by an inn-keeper for words spoken of him in his trade, proof that upon one occasion he sold spirits to be consumed out of his house is sufficient. *Whittington v. Gladwin*, 2 *C. and P.* 146. Where the plaintiff averred that he was employed by "The New England Company," and that the libel was published of him in such employment, it was held sufficient to prove that the Company was commonly so called, though that was not its legal name. *Rutherford v. Evans*, 6 *Bingh.* 451.

The allegation that the words were spoken in the presence and hearing of A. B., and others, is supported by proof that they were spoken in the presence of others only. *B. N. P.* 6.

The declarations of spectators whilst viewing a libellous picture publicly exhibited, were admitted by Lord Ellenborough as evidence that the picture was intended to represent the parties libelled. *Dubost v. Beresford*, 2 *Campb.* 512.

Proof of innuendo.] The plaintiff must in general prove the innuendos as laid. The whole of an innuendo which is not on the face of the declaration a bad one must be proved, for it gives a specific character to the libel or slander, which becomes part of the issue. *Williams v. Stott*, 1 *Crom. and M.* 687. *Harvey v. French*, 1 *Crom. and M.* 11. *Roberts v. Camden*, 9 *East*, 93. Thus where the words, in fact, imputed either a fraud or a felony, but by the innuendo were confined to the latter, Lord Ellenborough ruled that the plaintiff must prove that they were spoken in the latter sense. *Smith v. Carey*, 3 *Campb.* 461. So if the plaintiff in stating a libel, connects it by innuendo with a particular allegation, he will be bound to prove a libel relating to the matter contained in that allegation. *Per Bayley, J., May v. Brown*, 3 *B. and C.* 128. *Sellers v. Till*, 4 *B. and C.* 656. But where the innuendo does not refer to any precedent averment, but improperly introduces new matter not necessary to sustain the action, it need not be proved, but may be rejected as surplusage. *Roberts v. Camden*, 9 *East*, 93. *Harvey v. French*, 1 *C. and M.* 11. So it is said by Tindal, C. J., that where the words spoken import in themselves a criminal charge, and the innuendo introduces matter which is merely useless, it may be rejected as surplusage. *Day v. Robinson*, 1 *Ad. and Ell.* 558.

Proof of malice.] Where the publication is defamatory, the law infers malice, unless something can be drawn from the circumstances attending the publication to rebut that infer-

ence. *Per Le Blanc, J., R. v. Creevey,* 1 *Maule and S.* 282. In such cases, therefore, it is unnecessary for the plaintiff to adduce any evidence of malice. But in actions for such slander as is *primâ facie* excusable, on account of the cause of speaking or writing it, as in the case of servants' characters, or confidential advice, or communications to persons who ask it, or have a right to expect it, malice in fact must be proved. *Per Bayley, J., Bromage v. Prosser,* 4 *B. and C.* 256; *and see M'Pherson v. Daniels,* 10 *B. and C.* 272. In order to maintain an action against a master for giving a false character of a servant, extraordinary circumstances of express malice must be proved. *Per Ld. Mansfield, C. J., Hargrave v. Le Breton,* 4 *Burr.* 2425. The plaintiff, a dissenting minister, accompanied by a friend, went to the defendant, who, in answer to questions put to him, stated that his wife had been cautioned against the plaintiff as a drunkard, &c. This was held to be a privileged communication, and that the plaintiff was bound to prove express malice. *Warr v. Solly,* 6 *C. and P.* 497. To prove such express malice, evidence that the character given was false, is admissible. *Rogers v. Clifton,* 3 *B. and P.* 587. *King v. Waring,* 5 *Esp.* 13. *Pattison v. Jones,* 8 *B. and C.* 578.

Evidence of other words or libels.] In an action for libel or for words, evidence of other libels or words is sometimes given, to show the *animus* of the defendant: thus it may be proved that the defendant spoke the same words at different times; *Charlton v. Barrett, Peake,* 22; so words spoken *after* those for which the action is brought, and whether actionable or not, are admissible to show *quo animo* the words which are the subject of the action were spoken. *Rustell v. Macquister,* 1 *Campb.* 49 (*n*). *Tate v. Humphrey,* 2 *Campb.* 73 (*n*). *Lee v. Huson, Peake,* 166. *Macleod v. Wakley,* 3 *C. and P.* 312. So in an action against the editor of a monthly periodical work, articles published from month to month alluding to the action and attacking the plaintiff, are admissible to show *quo animo* the libel was published, and that it was published concerning the plaintiff. *Chubb v. Westley,* 6 *C. and P.* 436; *but see Meude v. Daubigny, Peake,* 124. So in an action for a libel published in a weekly paper, evidence was admitted that other papers of the same title had been *since* purchased at the defendant's shop, to show that the papers which purported to be weekly publications of public transactions were sold deliberately, and vended in the regular course of public circulation; but Lord Ellenborough added, that he should direct the jury not to take it into consideration in damages. *Plunkett v. Cobbett,* 5 *Esp.* 136. Evidence of other libels is not admissible, unless they directly refer to the libel set out in the declaration; *Finnerty v. Tipper,* 2 *Campb.* 72; and where the

libellous intention of the defendant was not equivocal, Lord Ellenborough rejected evidence of subsequent publications, which were offered to show the *animus* of the defendant. *Stuart v. Lovell*, 2 *Stark.* 95. Where other words than those laid in the declaration are thus given in evidence, the defendant may prove such words to be true, because he has no opportunity of justifying them. *Waine v. Chadwell*, 2 *Stark.* 457.

Evidence of plaintiff's good character.] The plaintiff will not be allowed to go into general evidence of his good character, either where the general issue alone is pleaded, or where there are pleas of justification on the record. *Stuart v. Lovell*, 2 *Stark.* 93. *Cornwall v. Richardson*, *R. and M.* 305, *vide ante p.* 51.

Proof of damage.] Where the words are actionable in themselves, it is not necessary, in order to sustain the action, to give any evidence of damage; *Tripp v. Thomas*, 3 *B. and C.* 427; but where special damage is the gist of the action, it must be proved as laid, or the plaintiff will be nonsuited. *B. N. P.* 6. In such cases the defendant will not be allowed, under a general allegation of damage, to give in evidence particular instances of damage; *B. N. P.* 7, 1 *Saund.* 243, *d* (*n*); *ante p.* 50; but where the declaration, in an action for slander imputing incontinence to the plaintiff, stated that he was preacher to a dissenting congregation in a certain chapel, and derived considerable profit from his preaching; and by reason of the slander, "the said persons frequenting his chapel had refused to permit him to preach there, and had discontinued giving him the gains which they usually had, and otherwise would have given," it was held sufficient, without saying who those persons were. *Hartley v. Herring*, 8 *T. R.* 130. Where the declaration stated, that in consequence of the libel, the plaintiff lost the profits of certain performances at the theatre, it was held that the box-keeper might be asked, "whether the receipts of the house had not diminished," but not "whether particular persons had not in consequence given up their boxes." *Ashley v. Harrison*, 1 *Esp.* 48. The persons particularised in the declaration as having left off dealing, &c. with the plaintiff, are the proper witnesses to prove that fact; 1 *Saund.* 243, *d* (*n*), which cannot be proved from their declarations. *Tilk v. Parsons*, 2 *C. and P.* 201. 1 *Esp.* 50. An allegation that by reason of the speaking of slanderous words by the defendant, one D. refused to trust the plaintiff, is not proved by evidence that the defendant spoke the words to E. who repeated them to D. *Ward v. Weeks*, 4 *Moore and P.* 796.

The special damage must be the legal and natural conse-

quence of the words spoken, and not the mere wrongful act of a third person; *Vicars v. Wilcocks*, 8 *East*, 1; *see Ward v. Weeks*, 4 *Moore and P.* 808; and it must not be too remote; thus where the defendant libelled a public performer, in consequence of which she refused to sing, and the party who had engaged her to sing brought an action on the case, Lord Kenyon was of opinion that the injury was too remote, and impossible to be connected with the cause assigned for it. *Ashley v. Harrison*, 1 *Esp.* 48. The loss of the substantial benefit arising from the hospitality of friends is sufficient damage. *Moore v. Meagher*, 1 *Taunt.* 39. Where, in consequence of defamatory words spoken by the defendant, the person to whom they are spoken turns the plaintiff out of his service, the defendant is liable, though the words were not believed by the person to whom they were spoken. *Knight v. Gibbs*, 1 *Ad. and Ell.* 43.

Words are not actionable, though special damage has ensued, unless they be in themselves disparaging. *Kelly v. Partington*, 3 *Nev. and M.* 116.

Defence.

By the rules of H. T. 4 W. 4, in an action of slander of a plaintiff in his office, profession, or trade, the plea of not guilty will operate to the same extent precisely as at present, in denial of speaking the words, of speaking them maliciously, and in the sense imputed, and with reference to the plaintiff's office, profession, or trade; but it will not operate as a denial of the fact of the plaintiff holding the office, or being of the profession or trade alleged.

Evidence to disprove the malice.] Where the words are *primâ facie* actionable, on which the law infers malice, but there are, in fact, circumstances attending the publication which rebut the inference of law, evidence of such circumstances will constitute a good defence under the general issue; *Fairman v. Ives*, 5 *B. and A.* 644, *Pattison v. Jones*, 8 *B. and C.* 578; *Blake v. Pilford*, 1 *Moo. and Rob.* 198, as where the words are spoken,—

1, By a Member of Parliament in his place; but the privilege does not extend to a subsequent publication of them. *R. v. Creevey*, 1 *Maule and S.* 273.

2, Where the words are spoken in the course of a legal proceeding, either by the party; *Ram v. Langley*, *Hutt.* 113, *Weston v. Dobneit*, *Cro. Jac.* 432, *Astley v. Young*, 2 *Burr.* 807; *Johnson v. Evans*, 3 *Esp.* 32; by a witness; *Brodie's case, cited Palmer*, 144, *Harding v. Bulman*, 1 *Brownl.* 2; by counsel; *Brooke v. Montague*, *Cro. Jac.* 90, *Hodgson v. Scarlett*, 1 *B. and A.* 232; or by a judge; *R. v. Skinner*, *Lofft*, 55, *Jekyll v. Sir J. Moore*, 2 *Bos. and Pul. N. R.* 341.

So words spoken *bonâ fide*, for the purpose of obtaining redress, or of forwarding the ends of justice, though not spoken in the course of a legal proceeding. *Lake v. King*, 1 *Saund.* 131. *R. v. Baillie, Bac. Ab. Libel, A.* 2. *R. v. Baillie*, 2 *Esp. Dig. N. P.* 10. 2*nd ed.* 21 *How. St. Tr.* 10, *S. C. Fairman v. Ives*, 5 *B. and A.* 642. Thus where the communication complained of is a representation made *bonâ fide* to a public officer by the defendant respecting the conduct of the plaintiff, a person under him, it is not *primâ facie* actionable, and this defence may be given in evidence under the general issue. *Blake v. Pilfold*, 1 *Moo. and Rob.* 198. So a letter to the Postmaster-General complaining of misconduct in a postmaster is not libellous, if it contain a *bonâ fide* complaint. *Woodward v. Lander*, 6 *C. and P.* 548. Where parties thus privileged exceed the limits of their privilege, and use defamatory expressions which the circumstances will not justify, it seems doubtful whether they ought to be sued in a common action for slander, or in a special action on the case, stating that the matter was spoken maliciously, and without reasonable or probable cause. *Flint v. Pike*, 4 *B. and C.* 484, 1 *B. and A.* 245 (*n*). *Fairman v. Ives*, 5 *B. and A.* 645.

3, Where the words are spoken in confidence, by way of advice. Thus, where a party is applied to for the character of a servant, and in giving that character makes use of defamatory words, it is not actionable. *Edmondson v. Stephenson*, *B. N. P.* 8. *Weatherstone v. Hawkins*, 1 *T. R.* 110. But if the supposed libel be not communicated *bonâ fide*, it does not fall within the protection which the law extends to privileged communications. *Per Bayley, J.*, *Pattison v. Jones*, 8 *B. and C.* 584. *Kelly v. Partington*, 2 *Nev. and M.* 460. Whether the master made the communication voluntarily or not, is a circumstance which the jury are to consider in forming an opinion on the *bona fides*. "I do not mean to intimate," says Lord Alvanley, *Rogers v. Clifton*, 3 *B. and P.* 592, "that if a servant were strongly suspected of having committed a felony while in his master's service, that master is not at liberty to warn others from taking him into their service; for it is the duty of every person to guard the public against admitting such servants into their houses." "A master may," says Mr. Justice Bayley, *Patteson v. Jones*, 8 *B. and C.* 578, "when he thinks that another is about to take into his service one whom he knows ought not to be taken, set himself in motion, and do some act to induce that other to seek information from, and put questions to him. The answers to such questions being *bona fide*, with the intention of communicating such facts as the other party ought to know, will, although they contain slanderous matter, come within the scope of a privileged communication. But in such a case it will be a question for the jury whether the defendant has acted *bonâ*

fide, intending honestly to discharge a duty, or whether he has acted maliciously, intending to do an injury to the servant." *See Child v. Affleck*, 9 *B. and C.* 403. So defamatory words, spoken by way of confidential advice to persons who ask it, or have a right to expect it, are privileged. Thus, in an action for saying of a tradesman, "*He cannot stand it long,—he will be a bankrupt soon,*" it appearing that the words were not spoken maliciously, but in confidence and friendship and by way of warning, Pratt, C. J., directed the jury that though the words were otherwise actionable, yet, if they should be of opinion that they were not spoken out of malice, but in the manner before mentioned, they ought to find the defendant not guilty. *Herver v. Dawson, B. N. P.* 8. *M'Dougal v. Claridge*, 1 *Campb.* 267. *Dunmore v. Bigg, Id.* 269 (*n*). A. being a tenant of B., was desired by the latter to inform him whether he saw or heard anything respecting the game. A. wrote a letter to B., informing him that his gamekeeper sold game. It was held that if A. had been so informed, and believed the fact to be so, this was a privileged communication, and that the gamekeeper could not maintain any action, for a libel against A. It was also held, that A. might give in evidence, representations made to him as to the conduct of the gamekeeper, but could not go into evidence of acts done by him. *Cockayne v. Hodgkisson*, 5 *C. and P.* 543. A., the tenant of a farm, required some repairs to be done at the farm house, and B., the agent of the landlord, directed C. to do the work. C. did it, but in a negligent manner, and, during the progress of it, got drunk; and some circumstances occurred which induced A. to believe that C. had broken open his cellar door, and obtained access to his cider. A., two days afterwards, met C., in the presence of D., and charged him with having broken his cellar door, and with having got drunk, and spoilt the work. A afterwards told D., in the absence of C., that he was confident C. had broken open the door. On the same day A. complained to B. that C. had been negligent in his work, had got drunk, and he thought he had broken open his cellar door. It was held, that the complaint to B. was a privileged communication, if made *bonâ fide*, and without any malicious intention to injure C. It was held also, that the statement made to C., in the presence of D., was also privileged, if done honestly and *bonâ fide*, and that the circumstance of its being made in the presence of a third person, does not *of itself* make it unauthorised; and that it was a question to be left to the jury to determine, from the circumstances, including the style and character of the language used, whether A. acted *bonâ fide*, or was influenced by malicious motives. It was held also, that the statement to D., in the absence of C., was unauthorised and officious, and therefore not protected, although made in the belief of its truth,

if it were in point of fact false. *Towgood v. Spyring*, 1 *Crom. M. and R.* 181, 4 *Tyr.* 582, *S. C.* *See also Brooks v. Blanchard*, 1 *Crom. and M.* 779, 3 *Tyr.* 844, *S. C.* Where a person originated false reports prejudicial to a tradesman, and was afterwards called on by the employers of the latter to examine the matters complained of, and repeated to them the false statement, it was held that this communication was not privileged. *Smith v. Mathews*, 1 *Moo. and Rob.* 151. The plaintiff and defendant were jointly interested in property in Scotland, of which C. was manager. The defendant wrote to C. a letter, principally about the property, and the conduct of the plaintiff with regard thereto, but containing a charge against the plaintiff with reference to his conduct to his mother and aunt; it was held, that though the part of the letter respecting the defendant's conduct as to the property might be confidential and privileged, that such privilege could not extend to the part of the letter about the plaintiff's conduct to his mother and aunt. *Warren v. Warren*, 1 *C. M. and R.* 250. Where the plaintiff brought an action against the defendant, for saying he had heard the plaintiff was hanged for stealing a horse, but it appeared upon the evidence that the words were spoken in grief and sorrow for the news, the plaintiff was nonsuited, there being no proof of malice. *Anon., coram Hobart, J., cited* 1 *Lev.* 82. But it seems to be no defence to show that the words were spoken carelessly, wantonly, or in jest. *Hawk. P. C. b.* 1, *c.* 28, *s.* 14, 8*th ed.* Words spoken *bonâ fide*, by way of moral advice, are privileged; as if a man write to a father, advising him to have better regard to his children, and using scandalous words, it is only reformatory, and shall not be intended to be a libel. 2 *Brownl.* 150. But if in such case the publication should be in a newspaper, though the pretence should be reformation, it would be libellous. *R. v. Knight, Bac. Ab. Libel, A.* 2. In these cases, if the circumstances attending the writing or speaking of the words be such as *primâ facie* to render them privileged, it is incumbent on the plaintiff, in order to entitle himself to a verdict, to prove malice in fact. *Bromage v. Prosser*, 4 *B. and C.* 247.

4, Where defamatory words are spoken or written *bonâ fide* with the view of investigating a fact in which the party is interested, they are privileged. Thus, where the defendant inserted an advertisement in a newspaper to ascertain whether, previously to a certain time, the plaintiff had been married, intending, as the innuendo stated, to insinuate that the plaintiff had been guilty of bigamy, but it appeared that the advertisement was inserted by the authority of the plaintiff's wife, Lord Ellenborough held, that if the investigation was set on foot, and the advertisement published by the plaintiff's wife, from anxiety to know whether she was le-

gally the wife of the plaintiff, though that is done through the medium of imputing bigamy to the plaintiff, it is justifiable. *Delany v. Jones*, 4 *Esp*. 191. *Finden v. Westlake*, M. *and* M. 462. But if the publication of the libel be more extensive than is necessary for the purpose of obtaining the desired information, it will be actionable. *Brown v. Croome*, 2 *Stark*. 297.

5, Whether the publication of the proceedings of a court of justice, where those proceedings contain defamatory matter, is privileged, has never been solemnly decided; but the inclination of the courts appears to be against the existence of such a privilege. *Lewis v. Clement*, 3 *B. and A*. 702. *Lewis v. Walter*, 4 *B. and A*. 613. *Flint v. Pike*, 4 *B. and C*. 476, 481: *but see Curry v. Walter*, 1 *Esp*. 456, 1 *B. and P*. 525, *S. C. R. v. Wright*, 8 *T. R*. 298. *Stiles v. Nokes*, 7 *East*, 504. *R. v. Fisher*, 2 *Campb*. 563. *Duncan v. Thwaites*, 3 *B. and C*. 583. *Roberts v. Brown*, 10 *Bingh*. 523. The publication of preliminary or *ex parte* proceedings containing defamatory matter is clearly actionable; as a publication of depositions before a justice of the peace on a charge of murder; *R. v. Lee*, 5 *Esp*. 123, *R. v. Fisher*, 2 *Campb*. 563, *Duncan v. Thwaites*, 3 *B. and C*. 583; or proceedings on a coroner's inquisition; *R. v. Fleet*, 1 *B. and A*. 379; or before a royal commissioner. *Charlton v. Walton*, 6 *C. and P*. 385. Where the defence has been, that the libel is a correct account of what passed in a court of justice, it has been usual to plead that defence specially; but it seems that, if available at all, it may be taken advantage of under the general issue, like other privileged communications. Though the defendant cannot plead in justification that the libel is a correct report of a preliminary or *ex parte* proceeding, as a coroner's inquest, yet he may, under the general issue, give in evidence the correctness of the report in mitigation of damages; but no evidence of the truth or falsehood of the facts stated at the inquest is in such case admissible on either side. *East v. Chapman*, *M. and M*. 46. *Charlton v. Walton*, 6 *C. and P*. 385. So under the general issue he may contend that the writing is not injurious, as where the editor of a newspaper reported a former trial for libel, in which the plaintiff recovered a verdict, although the report contained some injurious allegations, yet the judge left it to the jury to say whether altogether the report was injurious, and the court held it rightly so left. *Chalmers v. Payne*, 2 *Crom. M. and R*. 156. *Vide post.*

6, So the defendant may show, under the general issue, that the libel is a fair criticism on the plaintiff's work; but if it contain observations unconnected with the work, and personally slanderous, it is actionable. *Carr v. Hood*, 1 *Campb*. 355 (*n*). *Macleod v. Wakley*, 3 *C. and P*. 311. *Soane v. Knight*, *M. and M*. 74. *Thompson v. Shackell*, *M. and M*. 117. That publication is not a libel which has for its object not to injure

the reputation of any individual, but to correct misrepresentations of fact, to refute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality. *Per Lord Ellenborough, Tabart v. Tipper*, 1 *Campb.* 352. So the editor of a newspaper may fairly and candidly comment on any place of public entertainment, but it must be done fairly and without malice, or view to injure or prejudice the proprietor in the eyes of the public. *Per Lord Kenyon, Dibdin v. Swan*, 1 *Esp.* 28. And it is not libellous fairly to comment upon a petition relating to matters of general interest, which has been presented to parliament and published. *Dunne v. Anderson. R. and M.* 287, 3 *Bingh.* 88.

Evidence of the truth of the libel or words.] Where the defendant admits the publishing or speaking of the libel or words as stated, but justifies so doing because they are true, he must plead this matter specially, and he will not be permitted to give it in evidence under the general issue. *Smith v. Richardson, Willes*, 20. 1 *Saund.* 130 (*n*). And such evidence is inadmissible under the general issue, either in bar of the action or in mitigation of damages. *Ibid. Underwood v. Parks*, 2 *Str.* 1200.

Where the plaintiff declares for a libel on him in the way of his trade, the defendant cannot now show, under the general issue, that the plaintiff does not in fact carry on such trade; the new rules declaring that this plea shall not operate as a denial of the fact of the plaintiff holding the office or being of the trade or profession alleged. *Ante p.* 375.

Evidence that the words were first spoken by another.] It has been said to be a good defence that the defendant was only the repeater of the slanderous words, and that he named the author of them at the time, and stated that he had heard them uttered, but such defénce must be specially pleaded. *Mills v. Spencer, Holt*, 533. At all events, the words actually uttered by the third person, and not merely the substance of them, must be proved, so as to furnish the plaintiff with a cause of action against such third person. *Maitland v. Gouldney*, 2 *East*, 426. *See also M'Gregor v. Thwaites*, 3 *B. and C.* 24; *Lewis v. Walter*, 4 *B. and A.* 605. And it must also be shown that the defendant believed the words to be true, and that he spoke them on a justifiable occasion. *M'Pherson v. Daniels*, 10 *B. and C.* 263. It has been ruled by Alderson, B., that these circumstances only go in mitigation of damages. *Bennett v. Bennett*, 6 *C. and P.* 588.

Evidence in mitigation of damages.] It was formerly held that where the defendant pleaded the general issue without a justification, he might prove that the plantiff had been *generally suspected* of the offence imputed to him by the defendant. *Earl*

of Leicester v. Walter, 2 *Campb.* 251. ——*v. Moore*, 1 *Maule and S.* 284. But it was held that evidence of *facts*, not amounting to complete justification, could not be received. *Waithman v. Weaver, D. and R. N. P. C.* 10. And it is now decided that general evidence of the plaintiff's bad character is not admissible in an action for a libel. Thus in an action for a libel on the plaintiff, tending to injure his credit and reputation in his profession and business of an attorney, it was held that general evidence of his bad character and ill repute in his business, could not be admitted, either to contradict the allegation in the declaration that the plaintiff exercised and carried on the business of an attorney with great credit and reputation, in order to mitigate the damages on the general issue, or in support of the averments in the defendant's justification, that the plaintiff was a dirsreputable professor and practitioner in the law. *Jones v. Stevens*, 11 *Price*, 235. The defendant cannot, in mitigation of damages, give in evidence other libels published of him by the plaintiff, not distinctly relating to the same subject. *May v. Brown*, 3 *B. and C.* 113. *See Finnerty v. Tipper*, 2 *Campb.* 77. Nor is general evidence that the plaintiff has been in the habit of libelling the defendant admissible. *Wakley v. Johnson, R. and M.* 422. But matter which cannot be pleaded in justification, as for instance, that certain proceedings took place at a coroner's inquest, may be given in evidence in mitigation of damages. *East v. Chapman, M. and M.* 46, 2 *C. and P.* 571, *S. C. supra.* And in actions for words not actionable in themselves, evidence of their truth may be given, under the general issue, to disprove malice. *Watson v. Reynolds, M. and M.* 1. So also, as before stated, *ante p.* 375, in cases of privileged communications, evidence of the circumstances which render the communications privileged, is admissible under the general issue. And where the defendant published an imperfect account of a trial which was libellous, he was allowed, in mitigation, under the general issue, to show that he had copied the statement from another newspaper, but not that it had appeared concurrently in several newspapers. *Saunders v. Mills*, 6 *Bingh.* 213.

Accord and satisfaction.] Accord and satisfaction is a good defence to this action; and where the plaintiff had agreed not to bring the action, in consideration of the defendant destroying certain documents relating to the charge imputed to the plaintiff, which the defendant accordingly destroyed, Lord Ellenborough admitted this in evidence as accord and satisfaction. *Lane v. Applegate*, 1 *Stark.* 97.

In an action for a libel, the defendant has a right to have the whole of the publication read from which the passages charged are extracts. *Cooke v. Hughes, R. and M.* 112. *See Mullett v. Hulton*, 4 *Esp.* 249.

CASE FOR MALICIOUS PROSECUTION.

In an action on the case for a malicious prosecution the plaintiff must prove, if those facts be put in issue by the pleadings, 1, The prosecution, 2, Its determination; 3, That the defendant was the prosecutor; 4, His malice and want of probable cause; and, 5, The damages sustained.

Evidence of prosecution.] The fact of the prosecution is usually proved by the production of the record, or of an examined copy. *See ante p.* 70. *B. N. P.* 13. And the record or copy is admissible without proof of an order of the court or *fiat* of the attorney general allowing the plaintiff a copy of such record. *Leggat v. Tollervey*, 14 *East*, 302. *Caddy v. Barlow*, 1 *M. and R.* 275. In an action for a malicious prosecution by indicting the plaintiff at the quarter sessions, it was held by Wilmot, J., that it was not sufficient to produce the original indictment, for that it was no evidence of the caption, which was a material averment in the declaration, *viz.*, that the quarter-sessions were held at such a time and place, and before such parties, and he was of opinion that this could not be supported by parol evidence of the minutes of the sessions, but that for this purpose a record should have been made up, and the original, or a copy, produced, and the plaintiff was nonsuited. *Edwards v. Williams*, 2 *Esp. Dig. N. P.* 37. *vide ante p.* 71. Some proof must be given of the identity of the plaintiff and the party prosecuted.

A variance between the charge actually made, and that stated in the declaration, will be fatal. Thus where it was stated in the declaration that the defendant imposed upon the plaintiff the crime of felony, and upon the production of the information before the justice, it appeared that the charge amounted only to a civil injury, though the warrant was to arrest the plaintiff on suspicion of felony, the variance was held fatal. *Leigh v. Webb*, 3 *Esp.* 165. But where the declaration averred that the defendant charged the plaintiff with *assaulting and beating* him, and procured a warrant to apprehend him for his said offence, and the charge in fact made was for assaulting *and striking*, and the warrant produced recited the charge to be for violently assaulting, it was held to be no variance. *Byne v. Moore*, 5 *Taunt.* 187, *quære the marginal note.* And where the plaintiff declared that the defendant maliciously charged the plaintiff with *having feloniously stolen* certain articles his property, and it was proved that the defendant laid an information before a magistrate, in which he deposed that the said articles had been feloniously stolen, and that *he suspected and believed, and had good reason to suspect and believe,* that they had been stolen by the plaintiff, it was held that the evidence supported the declaration. *Davis v. Noake*,

6 *Maule and S.* 29, 1 *Stark.* 377, *S. C. diss. Bayley, J.* Where the plaintiff declares that the defendant maliciously and without probable cause preferred an indictment (setting it forth), the averment is proved, if some charges in the indictment were maliciously and without probable cause preferred, though there was good ground for preferring other of the charges. *Read v. Taylor,* 4 *Taunt.* 617. As to other variances in proof of the record, *vide ante p.* 64.

If the proceeding was by preferring a charge before a magistrate, the magistrate or his clerk should be served with a *subpœna duces tecum,* to produce the proceedings. If the information was laid by the defendant, his taking the oath and handwriting should be proved, as also the issuing the warrant to the constable, &c. The warrant must also be produced and proved, and evidence must be given of the apprehension and detention of the plaintiff under the warrant, and of his ultimate discharge. 2 *Stark. Evid.* 910, 1*st ed. and see Freeman v. Arkell,* 2 *B. and C.* 494. Where the action is for maliciously procuring the plaintiff to be arrested, upon a warrant on a charge of felony, and it does not appear that any information has been taken, evidence may be given of the warrant without proving any information. *Newsam v. Carr,* 2 *Stark.* 69. *See Clarke v. Postan,* 6 *C. and P.* 423.

Evidence of determination of prosecution.] It must appear that the prosecution is determined. *B. N. P.* 13. The return of *not a true bill* by the grand jury, or the verdict of acquittal, will be evidence of this fact; and an averment that the plaintiff, "by a *jury* of the said county, &c. was duly and in a lawful manner acquitted," is proved by a record, by which it appears that the jury found the plaintiff not guilty, and that, upon that, judgment was entered that he should "go thereof acquitted." *Hunter v. French, Willes,* 517. Where the declaration averred that the defendants "did not prosecute the suit complained of, but therein made default, and their pledges were in mercy &c." it was held, that the production of a rule to discontinue did not prove the averment, and Lord Tenterden refused to allow an amendment under the statute 9 G. 4, c. 15. *Webb v. Hill, M. and M.* 253; *and see ante p.* 56. An action lies though the plaintiff was acquitted on a defect in the indictment. *Wicks v. Fentham,* 4 *T. R.* 247. *Pippet v. Hearn,* 5 *B. and A.* 634. As to variance, *see Purcell v. Macnamara,* 9 *East,* 157, *stated ante p.* 65.

Evidence that defendant was prosecutor.] The proper evidence to establish this fact is that the defendant employed an attorney or agent to conduct the prosecution; that he gave instructions concerning it; paid the expenses; procured the attendance of witnesses; or was otherwise active in forwarding the prosecution, 2 *Stark. Evid.* 908, 1*st ed.* So the information taken

by the magistrate, or the warrant issued by him, may be sufficient for this purpose. 2 *Phill. Ev.* 161. So the recognizance to prosecute entered into by the defendant. *Eager v. Dyot*, 5 *C. and P.* 4. The indorsement of the defendant's name on the bill is evidence that he was sworn as a witness, though not of his being the prosecutor. *B. N. P.* 14. One of the grand jury before whom the bill was preferred may be called to prove that the defendant was the prosecutor. *Sykes v. Dunbar, Selw. N. P.* 1004.

Evidence of malice.] It is essential that the plaintiff should give some evidence of the defendant's malice. Proof of an acquittal for want of prosecution is not even *primâ facie* evidence of malice to support the action. *Purcell v. Macnamara*, 9 *East*, 361. But if the plaintiff prove want of probable cause, malice may be inferred from thence. *Ibid. Burley v. Bethune*, 5 *Taunt.* 583. *Turner v. Turner, Gow*, 20. But the want of probable cause is only presumptive evidence of malice, and must not be left to the jury as *conclusive*. *Mitchell v. Jenkins*, 5 *B. and Ad.* 588, 2 *Nev. and M.* 301, *S. C.* Proof that the defendant published an advertisement of the finding of the indictment with other scandalous matter, is evidence of malice. *Chambers v. Robinson*, 2 *Str.* 691. Where a forged note was taken in the ordinary course of business, and a bank inspector, in the absence of any circumstances of suspicion, charged the taker as having the note in his possession, knowing it to be stolen, Lord Ellenborough held that this was such a *crassa ignorantia* that it amounted to malice. *Brooks v. Warwick*, 2 *Stark.* 389. In an action by A. for the malicious prosecution by C. of an indictment against A. and B., evidence of the misconduct of C. towards B. after his apprehension, tending to show the bad motives of C., is admissible in proof of malice. *Caddy v. Barlow*, 1 *Mann. and R.* 275. To support the averment of malice it must be shown that the charge is wilfully false. *Per Abbott, C. J., Cohen v. Morgan*, 6 *D. and R.* 9.

Evidence of want of probable cause.] The plaintiff must give some evidence of want of probable cause. *Incledon v. Berry*, 1 *Campb.* 203 (*n*). The general issue, since the new rules, puts in issue the probable cause. *Cotton v. Brown*, 4 *Nev. and M.* 831. But slight evidence is sufficient. *Taylor v. Willans*, 2 *B. and Ad.* 857. Proof of express malice is not evidence of it. *Johnson v. Sutton*, 1 *T. R.* 545. *Turner v. Turner, Gow*, 20. Abandoning the prosecution is not sufficient evidence of want of probable cause. *Incledon v. Berry*, 1 *Campb.* 203 (*n*). Nor neglecting to prefer an indictment, after a charge laid. *Wallis v. Alpine, Id.* 204 (*n*). *Willans v. Taylor*, 6 *Bingh.* 188. So proof that the bill was thrown out by the grand jury is not evidence of the want of probable cause. *Byne v. Moore*, 5 *Taunt.* 187. But in *Nicholson v. Coghill*, 4 *B. and C.* 23,

it was said by Holroyd, J., that in actions for malicious prosecutions it has been held that evidence of the bill having been thrown out by the grand jury is sufficient to warrant an inference of the absence of probable cause. Where the plaintiff refused to give up a forged note, which he had taken in the course of business, to the defendant, a bank inspector, and the defendant, in the absence of all circumstances of suspicion, charged the plaintiff before a magistrate, with feloniously having the note in his possession, it was held to be evidence of want of probable cause to go to the jury. *Brooks v. Warwick*, 2 *Stark.* 389. The motives of the party are a fact for the consideration of the jury. *Taylor v. Willans*, 2 *B. and Ad.* 845. *Venafra v. Johnson*, 10 *Bingh.* 301, 3 *Moore and S.* 847, *S. C.* Thus if the defendant lay all the facts of the case fairly before counsel, and act *bonâ fide* upon the opinion given by that counsel (however erroneous it may be), it will be evidence to prove probable cause; *per Bayley, J., Ravenga v. Macintosh*, 2 *B. and C.* 697; *and see Snow v. Allen*, 1 *Stark.* 502; but not unless a full statement of the case has been laid before counsel. *Hewlett v. Cruchley*, 5 *Taunt.* 281. Where there are no facts in dispute "reasonable and probable cause" is a pure question of law, and the judge may nonsuit the plaintiff, if he thinks there was such cause. *Blachford v. Dod*, 2 *B. and Adol.* 179. *But see Venafra v. Johnson, supra.*

It has been said that where the facts lie in the knowledge of the defendant himself, *he* must show a probable cause, though the indictment be found by the grand jury, or the plaintiff shall recover without proving express malice. *Parrott v. Fishwick, B. N. P.* 14. *And see* 4 *B. and C.* 24, 6 *Bingh.* 187, 189. But this position is not supported by another report of the same case, 9 *East*, 362 (*n*), from which it appears that the plaintiff having been acquitted on the indictment, Lord Mansfield said, "that it was not necessary to prove express malice, *for if it appeared there was no probable cause*, that was sufficient to prove an implied malice, which was all that was necessary to support this action. For in this case all the facts lay in the defendant's own knowledge, and if there were the least foundation for the prosecution, it was in his power, and incumbent upon him to prove it." It seems from this report that some evidence of want of probable cause had been given, from which malice was inferred, and that the question was whether it was incumbent upon the plaintiff to go further. So in *Sykes v. Dunbar, cited* 9 *East*, 363, where the defendant was the only witness upon the indictment, Lord Kenyon ruled that the proof of malice lay upon the plaintiff. And in a late case it was said by Tindal, C. J., that the plaintiff must take the first step; because it is not to be presumed that any one has acted illegally. There must, therefore, be some evidence of want of probable cause before the defendant can be called upon to justify his conduct. *Willans v. Taylor*, 6 *Bingh.* 187,

S. C., in error, 2 *B. and Ad.* 845. In the latter case the defendant presented two bills for perjury against the plaintiff, but did not himself appear before the grand jury, and the bills were ignored. He then presented a third bill, and on his own testimony it was found. This prosecution he kept suspended for three years, till the plaintiff taking the record down to trial, and the defendant declining to appear as a witness, although in court, and called on, the plaintiff was acquitted. It was held that this was sufficient *primâ facie* evidence of want of probable cause. Want of probable cause is in effect the evidence of a negative, and very slight evidence of a negative is sufficient to call upon the other party to prove the affirmative. *Per Lord Tenterden, Cotton v. James*, 1 *Barn. and Adol.* 133.

The observations of the judge on the trial of the indictment tending to cast censure on the mode in which the prosecution had been conducted, are admissible for the plaintiff. *Warne v. Terry, coram Littledale, J., M. S. Winton Sum. Ass.* 1826.

Damages.] The jury will give damages for the loss of reputation, the imprisonment, if any have taken place, and the expenses incurred by the plaintiff in making his defence. *B. N. P.* 13.

Defence.

The want of probable cause is put in issue by *Not Guilty* since the new rules. *Cotton v. Browne*, 4 *Nev. and M.* 831.

The defendant may give in evidence facts to disprove the malice, or to show that he had probable cause for the prosecution. Thus he may show that the jury deliberated on the trial of the indictment. *Smith v. Macdonald*, 3 *Esp.* 7. Lord Kenyon ruled that the defendant might give evidence of the plaintiff's bad character; *Rodguez v. Tadmire*, 2 *Esp.* 721; but in a later case, *Wood, B.*, refused such evidence, on the ground that it afforded no proof of probable cause to justify the defendant. *Newsam v. Carr*, 2 *Stark.* 70.

If no one was present at the time of the supposed felony committed, but the defendant or his wife, his or her evidence, on the trial of the indictment, is, it is said, admissible for the defence to prove the felony committed. *B. N. P.* 14, 15.

CASE FOR MALICIOUS ARREST.

In an action on the case for a malicious arrest, the plaintiff must prove the arrest, the determination of the suit, the defendant's malice and want of probable cause, and the damage, or so many of those facts as are denied on the pleadings.

The arrest.] If the form of the pleadings require it, the plaintiff should be prepared to prove the affidavit to hold to

bail, by the production of the original, or of an examined copy; *Crook v. Dowling*, 3 *Dougl.* 75, *B. N. P.* 14, *S. C. Casburn v. Reed*, 2 *B. Moore*, 60; *see R. v. James*, 1 *Show.* 397; *Rees v. Bowen*, 1 *M'Cl. and Y.* 392; but unless there be an allegation in the declaration that the writ was indorsed for bail "by virtue of an affidavit filed," &c., it seems to be unnecessary to prove the affidavit, *Arundell v. White*, 14 *East*, 224, unless for the purpose of connecting the defendant with the arrest. The writ indorsed was held by Buller, J., to be sufficient evidence of the holding to bail. *Rogers v. Ilscombe*, 2 *Esp. Dig. N. P.* 38. The plaintiff must also prove the writ and return, *ante p.* 73, and in one case, though the return of *cepi corpus* appeared on the writ, Lord Kenyon ruled, that, as against the defendant, there was no evidence of the arrest having been under the writ, and the plaintiff, not being able to prove the warrant, was nonsuited. *Lloyd v. Harris*, *Peake*, 174. But it seems that the sheriff's return is *primâ facie* evidence of the fact therein stated. *Gyfford v. Woodgate*, 11 *East*, 297; *and see* 2 *Phill. Evid.* 166. In order to prove the arrest, the plaintiff may call the sheriff's officer. If a bailiff, who has a process against one, says to him when he is on horseback, or in a coach, "You are my prisoner, I have a writ against you," upon which he submits, turns back or goes with him, though the bailiff never touch him, yet this is an arrest, because he submitted to the process; but if instead of going with the bailiff he had gone or fled from him, it could be no arrest, unless the bailiff had laid hold of him. *Per cur. Herner v. Battyn*, *B. N. P.* 62. Where a sheriff's officer having a warrant to arrest A. sent a message to him to fix a time to call and give bail, and A. accordingly fixed a time, attended and gave bail, in an action for a malicious arrest, this was held to be no arrest. *Berry v. Adamson*, 6 *B. and C.* 528. Where the officer showed the party the writ, saying that as he knew him, he would take his word, but that he must give bail, and after receiving a fee from him, left him and went to his attorney to tell him what had occurred, Lord Tenterden said, that his strong opinion was, that this was no arrest. *Goye v. Radford*, 3 *C. and P.* 464; *and see more as to arrest, post*, "*Actions against Constables.*"

Determination of the suit.] It is necessary to show *how* the proceeding complained of, whether civil or criminal, terminated, and the proof must correspond with the allegation. Therefore where it was averred that "the plaintiffs in that action did not prosecute their suit, but therein made default, whereupon it was considered that the said plaintiffs should take nothing by their bill, and the pledges to prosecute be in mercy," &c., it was ruled that this, being an allegation of a nonsuit, was not proved by a rule to discontinue, and that the

variance could not be amended under Stat. 9 Geo. 4, c. 15. *Webb v. Hill, M. and M.* 253. The declaration stated that it was referred to the Prothonotary to ascertain the debt, the costs to be in the discretion of the Prothonotary; that he found the debt to be, &c. and ordered the plaintiff to pay the costs, "whereupon and whereby the said suit was ended and determined." It was proposed to be proved that *a rule* had been obtained to refer the action to the Prothonotary; that the parties attended him, that he found the debt due, and that the plaintiff accepted that and the costs. It was held that this evidence was not admissible under the allegation in the declaration, Patteson, J., observing that the mere acceptance of debt and costs, without the intervention of the court, could not properly be called a determination of the suit. *Combe v. Capron*, 1 *Moo. and Rob.* 398. Proof of a rule to discontinue, and that the costs have been accordingly taxed and paid, is sufficient evidence of the determination of the suit. *Bristow v. Haywood*, 4 *Campb.* 214, 1 *Stark.* 48, *S. C. Gadd v. Bennett*, 5 *Price*, 540. *Brandt v. Peacock*, 1 *B. and C.* 649. So a *rule* to stay proceedings, and deliver up to the then defendant the bill of exchange upon which the action was brought. *Brook v. Carpenter*, 3 *Bingh.* 297. But where the evidence of the determination of the suit was *a judge's order* to stay proceedings, and payment of costs, Lord Kenyon was inclined to think that it was insufficient, and a juror was afterwards withdrawn. *Kirk v. French*, 1 *Esp.* 80, *and see* 4 *Campb.* 214, *sed quære, and see Austin v. Debnam*, 3 *B. and C.* 140. Not declaring for a year after the return of the writ is evidence of the determination of the suit, and will support an averment that the party did not declare, but permitted the suit to be discontinued. *Pierce v. Street*, 3 *B. and Ad.* 397. In an action for a false arrest upon a plaint in the Sheriff's court of London, evidence was given that the usual course of that court, upon the abandonment of a suit by the plaintiff, was to make an entry in the minute-book of "withdrawn," and it was held that proof of such entry in the minute-book was sufficient to prove the determination of the suit. *Arundell v. White*, 14 *East*, 216. The termination of the suit must be such as to afford *primâ facie* evidence that the action was without foundation; therefore, where it appeared that a *stet processus* had been entered by consent, the plaintiff was nonsuited. *Wilkinson v. Howel, M. and M.* 495.

In an action for maliciously suing out a commission of bankrupt, it must be averred and proved that the commission was superseded before the commencement of the action. *Whitworth v. Hall*, 2 *Barn. and Ad.* 695.

Evidence of malice, and want of probable cause.] It lies upon the plaintiff in this action, as in the action of case for a ma-

licious prosecution, *ante p.* 384, to prove both malice, and the want of probable cause. Proof that the suit was discontinued, was held by Lord Ellenborough not to be evidence of want of probable cause; *Bristow v. Haywood*, 1 *Stark.* 50; but in a later case, where the defendant had arrested the plaintiff on an affidavit of debt for money paid to his use, but did not declare, until ruled to do so, and soon afterwards discontinued the action, and paid the costs, this was held to be evidence to go to the jury of malice, and the want of probable cause. *Nicholson v. Coghill*, 4 *B. and C.* 21. *Webb v. Hill*, *M. and M.* 254. That the defendant suffered himself to be *non-prossed* in the former suit has been held not to be evidence to support this action. *Sinclair v. Eldred*, 4 *Taunt.* 7. However, in a previous case of *Hamilton v. Reddell*, *coram Pratt, C. J.*, 4 *July*, 1765, *Bearcroft's MSS.* 22, not cited in *Sinclair v. Eldred*, it was ruled that the defendant's suffering the former action to be *non-prossed* was sufficient *primâ facie* evidence of malice. Per Pratt, C. J. "Here the defendant's never proceeding, and suffering a *non-pros.*, is, in my opinion, *primâ facie* evidence of malice. I hold most clearly that the affidavit, arrest, bail, and *non-pros.*, make up sufficient *primâ facie* evidence to call for a defence." Where there are mutual dealings between the plaintiff and defendant, and items known to be due on each side of the account, an arrest for the amount of one side of the account, without deducting what is due on the other, is malicious and without probable cause. *Austin v. Debnam*, 3 *B. and C.* 139, *overruling Brown v. Pigeon*, 2 *Campb.* 594. Taking a less sum out of court, and not proceeding in the suit, is not enough to maintain this action, it appearing that the defendant had claimed a larger sum; *Jackson v. Burleigh*, 3 *Esp.* 34; and suing out a writ, and arresting a debtor after payment of the debt by him to the creditor's agent (the affidavit to hold to bail being made before such payment) does not afford evidence of malice. *Gibson v. Chaters*, 2 *B. and P.* 129. A., by mistake, sued out a bailable writ against B., and gave it to an officer to be executed; and the officer told B. that he had a writ against him; but B. denying that he owed the money the officer did not take him into actual custody. On inquiry, the mistake was discovered. and B. was told that he need give himself no further trouble in the matter. He afterwards, however, put in bail, and incurred an expense of 14*l.* *Per Lord Ellenborough*, the action cannot be maintained; as no arrest or imprisonment has been proved, there is no evidence of malice, and the plaintiff has suffered no inconvenience except what he has voluntarily brought upon himself. *Bieton v. Burridge*, 3 *Campb.* 140. So where the plaintiff was arrested by the indorsee of a bill of exchange, purporting to be drawn on and accepted by him, but in fact not accepted by him, Lord Tenterden ruled that this was not sufficient to sup-

port an action for a malicious arrest, the defendant having acted through mistake, and without malice. *Spencer v. Jacob, M. and M.* 180.

In an action for maliciously suing out a commission of bankrupt, a supersedeas is not alone evidence of want of probable cause. *Hay v. Weakley*, 5 *C. and P.* 361.

In an action for not accepting the debt and costs from a party in custody under a *ca. sa.*, the refusal of the plaintiff in the former action to sign a discharge to the sheriff, on tender of the debt and costs, is *primâ facie* evidence of malice. *Crozer v. Pilling*, 4 *B. and C.* 26.

In an action for a malicious arrest, the court of Common Pleas determined that the plaintiff was not entitled to recover more than the taxed costs which he had incurred; *Sinclair v. Eldred*, 4 *Taunt.* 7; *and see Rogers v. Ilscombe*, 2 *Esp. Dig. N. P.* 38. *Jenkins v. Biddulph*, 4 *Bingh.* 160. And in a late case, Best, C. J., ruled the same way. *Webber v. Nicholas, R. and M.* 419. But Lord Ellenborough held that he might recover the amount of costs as between attorney and client. *Sandback v. Thomas*, 1 *Stark.* 306. *Jones v. Dyke, Sudg. V. and P. app.* 8; *and see Hodges v. Earl of Lichfield*, 1 *Bingh. N. C.* 500.

Competency of witness.] An arbitrator to whom the former cause had been referred, and who, on inspection of the then plaintiff's books, had awarded that he had no cause of action, was rejected by Lord Kenyon, when produced as a witness to prove the malice in this action; upon the principle that as the parties themselves could not have been examined in the former cause, and as the plaintiff could not have been compelled by a judge at Nisi Prius to produce his books, the arbitrator ought not to be permitted to give evidence derived from those sources. *Habershon v. Troby*, 3 *Esp.* 38; *but see Gregory v. Howard*, 3 *Esp.* 113.

CASE FOR EXCESSIVE DISTRESS.

In an action for an excessive distress the plaintiff must prove the tenancy as stated, that rent was due, that a distress was made, and that the distress taken was excessive, or such of those facts as are denied upon the pleadings.

Form of action—case or trespass.] At common law no action lay for an excessive distress; *Lynne v. Moody, Fitzg.* 85; but a remedy by action on the case was given by the statute of Marlbridge, 52 H. 3, c. 4, which enacts that "distresses

shall be reasonable, and not too great." Trespass will not lie, for taking an excessive distress, because the first entry is lawful; *Lynne v. Moody*, 2 *Str.* 851, *Fitzg.* 85, *S. C.*, *Hutchins v. Chambers*, 1 *Burr.* 590; though an exception to this rule was established in the case of *Moir v. Munday*, *cited* 1 *Burr.* 590, where it was held that an action of trespass lay for taking six ounces of gold, and one hundred ounces of silver, as a distress for 6*s.* 8*d.*; but it was said that in all other cases of goods, and other things of arbitrary and uncertain value, the action must be upon the statute. *See also Crowther v. Ramsbottom*, 7 *T. R.* 658. Nor will trover lie. *Whitworth v. Smith*, 1 *Moo. and Rob.* 193. *Batchelor v. Vyse*, *Id.* 331, 4 *Moore and S.* 552.

Though the tenant, before the distress, has tendered the rent, which makes the taking unlawful, he may still waive the trespass, and sue in case for an excessive distress. *Branscomb v. Bridges*, 1 *B. and C.* 145, 2 *D. and R.* 265, 3 *Stark.* 171, *S. C.*

Evidence of the tenancy and rent due.] The allegation in the declaration is general, that the plaintiff held and enjoyed certain premises, as tenant thereof to the defendant, which, when denied, may be proved in the usual manner.

It is not necessary to prove that the exact sum stated as rent due, was in arrear. Thus, where the declaration alleged that a certain sum, to wit, 4*l.* 3*s.* *and no more*, was in arrear, and it appeared in evidence that 82*l.* 10*s.* was due to the defendant, who had distrained for 95*l.*, it was held that the plaintiff was entitled to recover. *Sells v. Hoare*, 8 *B. Moore*, 451, 1 *Bingh.* 401, *S. C.*

If the situation of the premises is strictly described, it must be proved as laid; thus, where they were stated to be in the parish of *St. George the Martyr, Bloomsbury*, and were proved to be in the parish of *St. George, Bloomsbury*, the plaintiff was nonsuited. *Harris v. Cook*, 2 *B. Moore*, 587. *Vide post*, "*Ejectment.*"

Proof of the distress.] The plaintiff must prove that his goods were distrained; but it is not necessary to show that they were sold or taken away, the seizure as a distress is sufficient. *Sells v. Hoare*, 8 *B. Moore*, 453. *Baylis v. Usher*, 4 *Moore and P.* 790. Where the landlord's agent went upon the tenant's premises, walked round them, and gave a written notice that he had distrained certain goods lying there for an arrear of rent, and that unless the rent was paid, or the goods replevied within five days, they would be appraised and sold, and then went away, not leaving any person in possession; it was held that this was a sufficient seizure to give the tenant a right of action for an excessive distress, and that the quitting

the premises without leaving any one in possession, was not an abandonment of the distress, since the statute 11 G. 2, c. 19, s. 10, gives the landlord power to impound, or otherwise secure on the premises, goods distrained for rent in arrear. *Swan v. Earl of Falmouth*, 8 *B. and C.* 456.

The fact of the distress may be proved by calling the broker, or other person who made the distress, and who will prove his authority from the defendant. If this evidence cannot be procured, the plaintiff should serve a notice to produce the warrant of distress, and give secondary evidence of it, or should connect the act of the bailiff with the defendant, by some other evidence.

Proof of the excess in the distress.] Where a landlord is about to make a distress, he is not bound to calculate very nicely the value of the property seized; but he must take care that some proportion is kept between that and the sum for which he is entitled to take it. *Per Bayley, J.*, *Willoughby v. Backhouse*, 2 *B. and C.* 823. Where seven guineas were in arrear, and goods were taken, valued by the plaintiff's witness at 30*l.* but which, in fact, sold for only 10*l.*, it was contended that the plaintiff ought to be nonsuited; but Lord Ellenborough left the case to the jury, and said, "there is a distinction between the cases where there is but one thing that can be distrained, and where there are many, and so the distress is divisible. If there is but one thing, that can be taken, so that it must be taken, or the party must go without his distress, for taking it no action lies, though it much exceeds the sum for which the distress is taken. But if there are several articles of some value, and there is much more taken than is sufficient to satisfy the rent and expenses, this action is maintainable, and express malice is not necessary to maintain the action, nor required to be proved; but it is not for every trifling excess that this action is maintainable, it must be disproportionate to some extent, and if disproportionate to an excess the action is clearly maintainable." *Field v. Mitchell*, 6 *Esp.* 71.

In order to establish the excess, the plaintiff must be prepared with proof of the value of the goods seized.

Defence.

The defendant may give evidence that the distress was not excessive, or that the chattel distrained was entire, and that there was no other distress. *Field v. Mitchell*, 6 *Esp.* 71, *supra*. If the plaintiff has previously recovered in replevin for the same taking, such recovery is a bar in this action. *Phillips v. Berryman*, 3 *Dougl.* 286, *S. C., cited Selw. N. P. Distress* ix. Where there has been an excessive distress, it is no defence that the plaintiff, after the distress, authorised

the defendant to sell, and gave him other powers with regard to the goods seized. *Willoughby v. Backhouse*, 2 *B. and C.* 821, 4 *D. and R.* 539, *S. C. Sells v. Hoare*, 8 *B. Moore*, 451, 1 *Bingh.* 401, *S. C.* The defendant is not bound by his notice of distress, but may abandon it, and show that more rent was due than there is stated. *Gwinney v. Philips*, 3 *T. R.* 645. *Crowther v. Ramsbottom*, 7 *T. R.* 658.

The broker who made the distress is an incompetent witness for the defendant. *Field v. Mitchell*, 6 *Esp.* 73, *ante p.* 103.

COVENANT.

There being no general issue in this action by which the whole declaration can be put in issue, the evidence depends on the nature of the issue joined in each particular case. And by the rules of H. T. 4 W. 4, in covenant, the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable

Evidence on plea of non est factum.] Under the plea of *non est factum*, the plaintiff must produce, and prove the execution of the deed, *vide supra*; and it may also be necessary to prove the amount of damage. Where *profert* has been made, and *non est factum* pleaded, the plaintiff at the trial will not be allowed to prove that the deed has been destroyed, and to give secondary evidence of its contents; *Smith v. Woodward*, 4 *East*, 585; and it is too late at *nisi prius* to move to put off the trial, in order to amend the declaration by omitting the *profert*; nor will the judge permit the amendment to be made at *nisi prius*; *Paine v. Bustin*, 1 *Stark.* 74; but in case the deed is pleaded as a lost deed, and is found before the trial, it may be given in evidence. *Hawley v. Peacock*, 2 *Campb.* 557.

If there be any material variance between the deed set out and that produced, it will be fatal, unless the deed has been set out on *oyer*, *see ante p.* 66; but it is no variance where the profert is "of the said indenture" to give in evidence *a counterpart. Pearse v. Morris*, 3 *B. and Ad.* 396.

Evidence on plea of assignment.] In an action against the assignee of a term, on a covenant in the lease, he may plead that he assigned the term before breach; and if the plea be traversed, he must prove the assignment as stated. When the defendant proved that he had executed the assignment, but that it had not been delivered to the assignee, but re-

mained in the hands of the solicitor of the defendant, who had a lien upon it, it was held sufficient. *Odell v. Wake*, 3 *Campb.* 394. The defendant need not prove notice of the assignment to the plaintiff; *Pitcher v. Tovey*, 1 *Salk.* 81; *Taylor v. Shum*, 1 *B. and P.* 21; nor the assent of the assignee to the assignment, for it is presumed. *Ibid.; and see Townson v. Tickell*, 3 *B. and A.* 31.

Evidence on plea of expulsion.] In covenant for non-payment of rent, where the defendant pleads an expulsion, proof of a mere trespass will not maintain the plea. *Hodgkin v. Queenborough*, *Willes*, 131. *B. N. P.* 177. Expulsion from part by the landlord, is a suspension of the whole rent. *Co. Litt.* 148, *b. Walker's case*, 3 *Rep.* 22, *b. Gilb. on Rents*, 148.

Evidence on plea traversing the title of the plaintiff.] Where the plaintiff sues as assignee, the defendant must traverse the title as stated, and it will be incumbent upon the plaintiff to prove it, either by showing the mesne conveyances from the original lessor, or by showing that the defendant has paid rent to himself, which will be evidence of the plaintiff's title as assignee. *Doe v. Parker*, *Peake, Ev.* 283, *5th ed.*; *see also Carvick v. Blagrave*, 1 *B. and B.* 531.

Evidence on plea traversing the title of the defendant.] In covenant, charging the defendant as heir, assignee, &c., he may deny his liability as such, and it will lie upon the plaintiff to prove that the defendant is heir or assignee as stated. In an action on a covenant in a lease, the allegation that the reversion came to and vested in the defendant by assignment, is proved by showing that he took as heir, for he is an assignee in law. *Derisley v. Custance*, 4 *T. R.* 75. If the plaintiff state the particulars of the defendant's title, instead of alleging generally that the term vested in him by assignment, and if those particulars are traversed, they must be proved as laid; *Turner v. Eyles*, 3 *B. and P.* 461; but where the allegation is that the term has vested in the defendant by assignment, it will be sufficient for the plaintiff, *primâ facie*, to show that the defendant has paid rent, or is in possession of the premises. 2 *Phill. Ev.* 125, 2 *Stark. Ev.* 437, *1st ed. Peake, Ev.* 284, *5th ed.* Thus, where A. had been tenant of certain premises, and upon his leaving them B. had taken possession, it was held, in the absence of any evidence to the contrary, that it might be presumed that he came in as assignee of A. although he had never paid rent. *Doe v. Williams*, 6 *B. and C.* 41. In answer to this the defendant may prove that he is in by an under-lease, and not by assignment. *Holford v. Hatch*, *Dougl.* 183. *Earl of Derby v. Taylor*, 1 *East*, 502. If he be charged as assignee of all the estate in certain premises, and he is in fact assignee of

the estate in part of the premises only, he should as it seems plead in abatement the non-joinder of the other tenants in common. *Merceron v. Dowson*, 5 *B. and C.* 479. So he may show that he is only devisee of an equitable estate ; *Mayor of Carlisle v. Blamire*, 8 *East*, 487 ; or only *appointee*, and not liable as such on a covenant binding the assigns, not being *in* by the appointer. *Roach v. Wadham*, 6 *East*, 289. Where a term has been mortgaged, it is not necessary in an action on a covenant charging the mortgagee as assignee, to prove that he has entered upon the premises. *Williams v. Bosanquet*, 1 *B. and B.* 238, *overruling Eaton v. Jacques*, *Dougl.* 441. But in order to charge an executor as assignee, it must be proved that he has entered upon the premises. *Tilney v. Norris*, 1 *Ld. Raym.* 553. 1 *Saund.* 1, *a* (*n*). In order to charge the assignees of a bankrupt termor, as assignees of the term, some evidence must be given of an acceptance of the lease by them, for till they manifest their assent to the assignment, the term still remains in the bankrupt. *Copeland v. Stephens*, 1 *B. and A.* 593 ; *see* 6 G. 4, c. 16, s. 75. But it has been held (under stat. 1 G. 4, c. 119,) that the provisional assignee under the insolvent act, 53 G. 3, c. 102, cannot refuse the assignment of a lease, and must be deemed to have consented to accept the property. *Crofts v. Pick*, 8 *Bingh.* 354. *Doe v. Andrews*, 4 *Bingh.* 348, *Best, C. J., diss.* 2 *C. and P.* 593, *S. C.* See 7 G. 4, c. 57, s. 23. Where the assignees of a bankrupt were chosen on the 8th July, and suffered the bankrupt's cows to remain on the premises till the 10th, during which time they were twice milked by order of the assignees, whose servant had received the key of the premises from the messenger under the commission, Lord Ellenborough held these circumstances a sufficient adoption of the demise. *Welsh v. Myers*, 4 *Campb.* 368. So where they entered upon and took possession of the premises upon which the bankrupt's effects remained, and delivered up the keys immediately after the effects were sold. *Hanson v. Stevenson*, 1 *B. and A.* 303. So where they put up a lease to sale, and accepted a deposit from the purchaser ; *Hastings v. Wilson*, *Holt*, 290 ; but the mere fact of putting up a lease to auction, the assignees having never taken possession, and there being no bidder, is not evidence of an acceptance. *Turner v. Richardson*, 7 *East*, 335. Where an assignee, chosen on the 15th November, 1823, kept the bankrupt upon the premises carrying on the business for the benefit of the creditors until the April following, himself occasionally superintending, but on the 22d Dec. 1823, disclaimed the lease by a letter to the landlord, it was held to be an acceptance ; *Clark v. Hume*, *R. and M.* 207 ; but where the assignees allowed the bankrupt's effects to remain on the premises for nearly twelve months, and in order to prevent a distress, paid certain arrears of rent, intimating at the same time to the landlord, that they

did not intend to take the lease unless it could be advantageously disposed of, and the lease was put up to sale by the assignees, but there were no bidders for it, and the assignees omitted for nearly four months to return the key to the landlord, it was held that there was no evidence of an acceptance. *Wheeler v. Bramah*, 3 *Camph*. 340. Trustees under an assignment for the benefit of creditors are entitled (like assignees of a bankrupt) to a reasonable time to consider whether they will take to a lease. *Carter v. Warne*, 4 *C. and P.* 191, *M. and M.* 479, *S. C.*

Evidence on plea traversing the breach.] Where the breach is traversed, it must be proved as laid in the declaration. *Harris v. Mantle*, 3 *T. R.* 307.

On a covenant, "not to assign, transfer, or set over, or otherwise do, or put away the indenture of demise, or the premises thereby demised, or any part thereof," it has been held that an underlease is no evidence of a breach; *Crusoe v. Bugby*, 3 *Wils*. 234; but where the proviso was "not to *set*, *let*, or assign over the demised premises, or any part thereof," an underlease was considered to be within the terms of the proviso; *Roe v. Harrison*, 2 *T. R.* 425; and where a lease contained a proviso for re-entry in case the lessee "should demise, lease, grant, or let the premises, or any part thereof, or convey, alien, assign, or set over the indenture, or his estate therein, or any part thereof, for all or any part of the term," it was held that proof that the lessee had entered into partnership with A., and agreed that he should have the use of a back room, and other parts of the premises exclusively, was evidence of a forfeiture. *Roe v. Sales*, 1 *Maule and S.* 297. But evidence that a lodger has been admitted for above a twelvemonth into the exclusive possession of a room, will not support a breach of a covenant not to underlet the house. *Doe v. Laming*, 4 *Camph*. 77. A compulsory assignment in law is not a breach of a covenant not to assign. Thus the sale of a lease under a *bonâ fide* execution against the lessee, is not a forfeiture of a condition not to assign, but if the tenant give a warrant of attorney to his creditor for the express purpose of enabling him to take the lease in execution, it will be a fraud and a breach of the condition. *Doe v. Carter*, 8 *T. R.* 57, 64. *Doe v. Skeggs*, *cited* 2 *T. R.* 134. So an assignment under a commission of bankrupt is no breach of a covenant not to assign; *Doe v. Bevan*, 3 *Maule and S.* 353; *and see Doe v. Smith*, 5 *Taunt*. 795; and an assignment of the term to trustees for the benefit of creditors, operating as an act of bankruptcy, and being a void deed, will not be a breach of the covenant. *Doe v. Powell*, 5 *B. and C.* 308. Whether a devise by will is a breach of a covenant not to assign, seems to be an unsettled question. *Berry v. Taunton*, *Cro. Eliz.* 331. *Knight v.*

Mory, id. 60. *Moore*, 351. *Dyer*, 45, *b.* 3 *Leon.* 67. *Sheph. Touch.* 144. *Swan v. Fox, Styles*, 482. *Crusoe v. Bugby*, 3 *Wils.* 237. *Doe v. Bevan*, 3 *Maule and S.* 361. On a covenant "not to let, assign, transfer, or otherwise part with the premises demised, or the lease," depositing the lease as a security was held to be no breach. *Doe v. Hogg*, 4 *D. and R.* 225. *Doe v. Laming*, 1 *R. and M.* 36. A lease contained a stipulation, that for every acre, and so in proportion for a less quantity of the land which the lessee should *suffer to be occupied* by any other person without the consent of the landlord, an additional rent should be paid. The tenant undertook to *use, occupy*, dress, and manure the land according to the custom of the country. The tenant, without the consent of the landlord, suffered other persons to use small portions of the land for the purpose of raising a potatoe crop. It was proved to be the custom of the country for farmers to pursue that course. It was held, that the landlord was entitled to the additional rent, this being an *occupation* of the land by other persons. *Greenslade v. Tapscott*, 1 *Crom. M. and R.* 55, 4 *Tyr.* 566, *S. C.* To prove the breach of a covenant not to assign or underlet, Lord Alvanley held it to be *primâ facie* sufficient to show that a stranger was in possession of the premises, apparently as tenant, and that on inquiry such stranger said he rented the house. *Doe v. Rickarby*, 5 *Esp.* 4. But on a covenant, "not to assign, set over, or otherwise let," Lord Ellenborough held that evidence that a stranger was in possession of the premises, and that he said he had taken the premises from another stranger, was not sufficient, for *non constat* that the party in possession was not a tortious intruder. *Doe v. Payne*, 1 *Stark.* 86. *Sed vide Doe v. Williams*, 6 *B. and C.* 41, *supra*.

On a covenant to repair, it is not sufficient evidence to maintain the breach to show that the house has been thrown down by a tempest, unless the covenantor has not repaired within a reasonable time; *Sheph. Touch.* 173; and where the covenant is to keep and leave the house in as good a plight as it was in at the time of the making of the lease, it is said that ordinary and natural decay is no breach of the covenant, and that the covenantor is only bound to do his best to keep it in the same plight, and therefore to keep it covered, &c. *Fitz. Ab. Cov.* 4. *Sheph. Touch.* 169. And accordingly in a late case it was held, that where a lessee covenants to repair old premises, he is not liable for such dilapidations as result from the natural operation of time and the elements. *Gutteridge v. Munyard*, 1 *Moo. and Rob.* 334. A covenant to *repair* is satisfied by *substantial* repairs. *Harris v. Jones*, 1 *Moo. and Rob.* 173. Where the covenant is to keep in repair during the continuance of the term, an action for the breach of the covenant may be maintained before the term has expired. *Luxmore v. Robson*, 1 *B. and A.* 584. Breaking a doorway

through the wall of the demised house, into an adjoining house, amounts to a breach of a covenant to keep in repair. *Doe v. Jackson*, 2 *Stark.* 293. A lessee covenanted to repair, uphold, support, sustain, maintain, &c. all and singular the houses and brick walls. During the term having pulled down a brick wall, dividing the court-yard in front from another yard at the side, this was held a breach of the covenant. *Doe d. Wetherell v. Bird*, 6 *C. and P.* 195. But a mere covenant to repair is not broken by alterations and improvements where improvements are contemplated by the lease. A private dwelling-house was demised for 40 years by lease, containing a covenant to repair and keep in repair the premises and all such buildings, improvements, and additions as should be made thereupon by the lessee during the term, with a proviso for an entry in case of breach of covenant. The lessee changed the lower windows into shop windows, and stopped up a doorway, making a new one in a different place, in the internal partition of the house. It was held that no forfeiture was incurred, the covenant being against *non-repair* and being qualified by the terms of the lease. *Doe v. Jones*, 4 *B. and Ad.* 126.

Where the administrator of a tenant for years enters upon and occupies the premises, it is no answer, in an action on a covenant to repair, that the premises yield no profit. *Tremeere v. Morison*, 1 *Bingh. N. C.* 89.

On a covenant for quiet enjoyment generally, it will not support the breach to show a *tortious* disturbance by a stranger, for it is only a covenant against persons having lawful title; *Dudley v. Folliott*, 3 *T. R.* 587, 2 *Saund.* 178 (*n*); but where the covenant is against disturbance by *a particular person*, it is sufficient to show any disturbance by him, whether by lawful title or otherwise. *Nash v. Palmer*, 5 *Maule and S.* 374. So where the covenant is against disturbance by the lessor, his heirs or executors, it is sufficient to show any disturbance by him or them. *Forte v. Vine*, 2 *Roll. Rep.* 21. 2 *Saund.* 181, *a*. Where the covenant is for quiet enjoyment against A., and any other person by his means, title, or procurement, it is sufficient proof of the breach to show an entry by A.'s wife, in whose name A. purchased, jointly with his own. *Butler v. Swinerton*, *Palm.* 339. So in case of a covenant for quiet enjoyment against all claiming by, from, or under him, a claim of dower by his wife is a breach of the covenant. *Godb.* 333, *Palm.* 340. So the appointee of A. by virtue of a power, in the making of which A. concurred, is a person claiming under him. *Hurd v. Fletcher*, 1 *Dougl.* 43. So where A seised in fee settled his estate upon himself for life, remainder to his first and other sons in tail, and made a lease, and covenanted for quiet enjoyment without interruption of the lessor, his heirs or assigns, or any other person claiming any estate, right, or interest, by, from, or under him or any of his ancestors, the

eldest son was held to be a person claiming under the lessor. *Evans v. Vaughan*, 4 *B. and C.* 261. Where the covenant is that the defendant has not done, permitted, or suffered any act, &c., the assenting to an act which the covenantor could not prevent is not a breach. *Hobson v. Middleton*, 6 *B. and C.* 295. Where it is necessary to prove a lawful disturbance, the plaintiff must prove the judgment and execution in ejectment, or must give other sufficient evidence of the claimant's title and disturbance; merely forbidding the plaintiff's tenant to pay his rent, is not a breach of the covenant for quiet enjoyment. *Witchcot v. Linesey*, 1 *Brownl.* 81.

A covenant by a lessor, that the lessee *paying the rent* and performing the covenants, shall quietly enjoy, is not a conditional covenant; and a plea, stating the non-payment of the rent, or a non-performance of a covenant by the lessee (to insure,) is no bar to an action, by the lessee, on the covenant for quiet enjoyment. *Dawson v. Dyer*, 2 *Nev. and Man.* 559.

The plaintiff may assign a breach on the implied covenant contained in the word *demised*, *Com. Dig. Cov.* (*A.* 4.), *Shep. Touch.* 160; but that covenant ceases with the estate out of which the lease is granted. *Adams v. Gibney*, 6 *Bingh.* 656. If a tenant underlets by deed, and the superior landlord distrains, the under tenant must sue on this implied covenant, and cannot recover in assumpsit. *Schlencker v. Moxsy*, 3 *B. and C.* 789. As to the period of limitation in actions of covenant, see statute 3 and 4 W. 4, c. 42, s. 3, *post p.* 400.

DEBT ON BOND.

In an action of debt on bond, the plaintiff on *non est factum* pleaded, must prove the execution of the bond; and where breaches have been assigned under the statute 8 and 9 W. 3, c. 11, s. 8, he must prove the breaches as assigned. By the rules of H. T. 4 W. 4, in debt on specialty, the plea of *non est factum* shall operate as a denial of the execution of the deed, in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable.

The breaches must be proved as in an action of assumpsit or covenant; but if they have been suggested on the roll, after judgment for the plaintiff on demurrer, it will be necessary to give some evidence that the bond produced, and in which the conditions are contained, is the same as that on which judgment has been obtained; for this purpose it will be sufficient, if the attorney for the plaintiff swears that the bond produced is the instrument delivered to him to bring the action, and that he knows of no other of the same date, without calling the attesting witnesses *Hodgkinson v. Marsden*,

Peake, Ev. 287, *5th ed.*, 2 *Campb.* 122, *S. C.* So where the defendant craved *oyer*, and set out the bond and condition which was for performance of covenants in an indenture of lease, and pleaded a sham plea, to which there was a replication, and then demurred; after judgment for the plaintiff, on the execution of the writ of inquiry, Lord Kenyon ruled that it was not necessary to prove the execution of the lease, as the defendant was estopped by his plea from saying that it was not duly executed. *Collins v. Rybot*, 1 *Esp.* 157. If the defendant lets judgment go by default, and the plaintiff thereupon makes his suggestion, in which he sets out the condition of the bond, and that appears to be for the performance of an award, or of articles of agreement or the like, the plaintiff must prove the condition of the bond, the award, indenture, or articles, as well as the breaches suggested. *Edwards v. Stone, coram Lawrence, J.*, 1 *Saund.* 58, *e* (*n*).

Defence.

The defendant may plead *non est factum*, which now puts in issue only the execution of the deed. Though the statute of limitations 21 Jac. 1, c. 16, did not apply to specialties, yet the defendant might, if the deed was upwards of twenty years old, and there had been no payment or acknowledgment of his liability within that period, have pleaded *solvit ad diem*, and relied upon the presumption of payment arising from lapse of time. But if there had been any payment of interest or acknowledgment, after the day appointed for the payment of the money, though upwards of twenty years had elapsed since the payment or acknowledgment, the defendant could not avail himself of this presumption of payment under the plea of *solvit ad diem*, though he might under the plea of *solvit post diem*. *Moreland v. Benet*, 1 *Str.* 652, *B. N. P.* 174.

But now by the statute 3 and 4 W. 4, c. 42, the period of limitation in actions of debt on specialty, and in other actions, is defined, and by the third section of that statute, it is enacted, that all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or *scire facias* upon any recognizance, and also all actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any *fieri facias*, and all actions for penalties, damages, or sums of money given to the party grieved, by any statute now or hereafter to be in force, that shall be sued or brought at any time after the end of the present session of Parliament, shall be commenced and sued within the time and limitation herein-after expressed, and not after; that is to say, the said actions of debt for rent upon an indenture of demise, or covenant, or debt upon any bond or other specialty, actions of debt or *scire facias* upon

recognizance, within ten years after the end of the present session, or within twenty years after the cause of such actions or suits, but not after; the said actions by the party grieved, one year after the end of the present session or within two years after the cause of such actions, or suits, but not after; and the said other actions within three years after the end of the present session, or within six years after the cause of such actions or suits, but not after; provided, that nothing herein contained shall extend to any action given by any statute, when the time for bringing such action is or shall be by any statute specially limited.

Infants, feme covert, &c.] And by section 4 it is enacted, that if any person or persons that is, or are, or shall be entitled to any such action or suit, or to such *scire facias*, is, or are, or shall be, at the time of any such cause of action accrued, within the age of twenty-one years, *feme covert, non compos mentis*, or beyond the seas, then such person or persons shall be at liberty to bring the same actions, so as they commence the same within such times after their coming to, or being of full age, *discovert*, of sound memory, or returned from beyond the seas, as other persons having no such impediment should, according to the provisions of this act, have done; and that if any person or persons, against whom there shall be any such cause of action, is, or are, or shall be, at the time such cause of action accrued, beyond the seas, then the person or persons entitled to any such cause of action, shall be at liberty to bring the same against such person or persons, within such times as are before limited, after the return of such person or persons from beyond the seas.

In case of acknowledgment in writing.] Provided always, that if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such indenture, specialty, or recognizance, or his agent, or by part-payment or part satisfaction on account of any principal or interest being then due thereon, it shall and may be lawful for the person or persons entitled to such actions to bring his or their action for the money remaining unpaid, and so acknowledged to be due, within twenty years after such acknowledgment by writing or part-payment or part satisfaction as aforesaid, or in case the person or persons entitled to such action shall, at the time of such acknowledgment, be under such disability as aforesaid, or the party making such acknowledgment be, at the time of making the same, beyond the seas, then within twenty years after such disability shall have ceased as aforesaid, or the party shall have returned from beyond the seas, as the case may be; and the plaintiff or plaintiffs in any such action on any indenture, specialty, or recognizance, may by way of replication state such acknowledgment, and that such action

was brought within the time aforesaid, in answer to the plea of this statute. *Sid.* 384. 1 *Saund.* 163 (*n*).

Where issue is joined on the plea of *comperuit ad diem*, the trial is by the record; *see Austen v. Fenton*, 1 *Taunt.* 23, *Tidd*, 239; and the plea is proved by the production of the recognizance roll, containing an entry of the appearance. *Whittle v. Oldaker*, 7 *B. and C.* 478. Where the defendant pleaded *nil debet*, and the plaintiff, instead of demurring, took issue upon that plea, the defendant was held to be let into any defence applicable to the plea of *nil debet*; *Rawlins v. Danvers*, 5 *Esp.* 38; and in such case it was said that the plaintiff must be prepared to prove, not only the execution of the bond, but also all the averments in the declaration which are put in issue by the plea of *nil debet*. 2 *Stark. Ev.* 140, 1*st ed.* 5 *Esp.* 39. But now, by the rules of H. T. 4 W. 4, the plea of *nil debet* is not allowed in any action. Where the defendant pleaded that there was not any assignment of the bond by the sheriff or under-sheriff, and it appeared in evidence that the bond had been assigned to the plaintiff by one of the under-sheriff's clerks, Lord Mansfield was of opinion that the seal to the assignment, being the seal of office, was sufficient to prove its validity, whoever had signed it. *Harris v. Ashley*, 1 *Selw. N. P.* 554.

When the action is brought by the assignee of the bond, and the assignment is traversed, it is not necessary to show that the witnesses subscribed their names in the presence of the officer executing the assignment. *Phillips v. Barlow*, 1 *Bingh. N. C.* 433, 5 *Moore and S.* 322, *S. C.*

DEBT FOR RENT.

In an action for rent due upon a demise by deed, the plea of *nil debet* is no longer, since the rules of H. T. 4 W. 4, pleadable, but the defendant must deny specifically some matter of fact alleged in the declaration, or plead specially in confession and avoidance.

Where the demise is denied it may be proved by production and proof of the lease executed by the defendant, but if the plaintiff sues as assignee of the reversion, and the defendant has not paid rent to him, he must also prove his title, as such assignee, by production and proof of the mesne assignments, or by showing that he is heir, &c. *See Sands v. Ledger*, 2 *Ld. Raym.* 792. The assignee of the reversion may maintain debt against the lessee, without giving him any notice of the assignment, for the action is sufficient notice; but if the rent has been paid to the original lessor before notice, it is a good defence. *Watts v. Ognell, Cro. Jac.* 192. *Birch v. Wright*, 1 *T. R.* 385. A variance between the demise stated, and that proved, will be fatal, but where it was alleged that the plaintiff had demised to the defendant three rooms, and it appeared in

evidence that the demise was of three rooms, *and the use of the furniture*, it was held to be rightly stated according to the legal effect, for the rent could not issue out of the chattels. *Walsh v. Pemberton, Selw. N. P.* 583. *Farewell v. Dickenson*, 6 *B. and C.* 251. *Ward v. Smith*, 11 *Price*, 19. A demise of a messuage and full licence to sport over a manor, &c. reserving an entire rent, and not under seal, is void, the incorporeal right not passing except by deed. *Bird v. Higgenson*, 4 *Nev. and M.* 505. A variance in the statement of the rent will be fatal, as where in the declaration it was stated to be 15*l.* per annum, and appeared in evidence to be 15*l.* and three fowls. *Sands v. Ledger*, 2 *Ld. Raym.* 793. So where it was stated that the plaintiff demised " yielding and paying therefore the yearly rent of 160*l.* by two even, &c." and the lease in fact was " yielding and paying during the said term (except as hereinafter mentioned)," and there was a subsequent clause for the reduction of the rent in a certain case, which had not however occurred, this was held a fatal variance. *Vavasour v. Ormrod*, 6 *B. and C.* 430.

Where the residue of a term of years becomes vested in executors, and the yearly value of the premises is less than the rent, the executors are still liable in the *debet* and *detinet*, or in covenant for so much of the rent as the premises are worth. *Rubery v. Stevens*, 4 *B. and Ad.* 241.

Defence.

Most of the following defences might formerly have been given in evidence under the plea of *nil debet*, but now, by the new rules (*vide supra*) they must all be specially pleaded. Payment to the plaintiff, or to another by his appointment; *Taylor v. Beal, Cro. Eliz.* 222, *Gilb. Ev.* 283; or that the plaintiff has agreed that a debt due by him to the defendant shall go in satisfaction of the rent; *Gilb. on Debt*, 443, *on Evid.* 283; so that the plaintiff was bound by covenant to repair the premises, and that he (the defendant) expended the rent in necessary reparations. *Taylor v. Beal, Cro. Eliz.* 222. *B. N. P.* 177, *but see Gilb. Ev.* 282. If the lease be by parol, and the lessor directs the lessee to repair, and the lessee repairs accordingly, the money so laid out is evidence of payment. *Gilb. on Debt*, 442. The defendant may also plead that the plaintiff expelled him from the premises and kept him out, until after the rent became due, which operates as a suspension of the rent; *B. N. P.* 177, *Gilb. Evid.* 279, 1 *Saund.* 204 (*n*); and an apportionment of the rent may be pleaded. *Hodgkins v. Robson*, 1 *Vent.* 276. *Gilb. on Rents*, 189. An eviction by a third person, under a title paramount, may be pleaded. *Wingfield v. Seckford*, 2 *Leon.* 10. 2 *Phill. Ev.* 143. *Gilb. on Debt*, 429. So a release. *Per Holt, C. J., Gallaway v. Susach*, 1 *Salk.* 284, 394. *Anon.* 5 *Mod.* 18. *Paramour v.*

Johnson, 12 *Mod.* 377. *Gilb. Ev.* 281, 283. *Gilb. on Debt*, 443. Where the demise is by deed, the statute of limitations was held not to apply. 21 *Jac.* 1, *c.* 16. *Freeman v. Stacy, Hutt.* 109. But the period of limitation is now governed by the statute, 3 and 4 W. 4, c. 42, s. 3, *ante p.* 400. Where it was not by deed, it was formerly held that the statute might be given in evidence under the plea of *nil debet. Anon.* 1 *Salk.* 278. *Draper v. Glassop*, 1 *Ld. Raym.* 153. *Com. Dig. Pleader*, (2 *W.* 16.) But it was afterwards decided that it must be pleaded. *Chappell v. Durston*, 1 *Crom. and J.* 1. *and see R. H. T* 4 *W.* 4.

By the 3 and 4 W. 4, c. 27, s. 42, no arrears of rent nor any damages in respect of such arrears of rent shall be recoverable by any distress, action, or suit, but within six years after the same shall have become due.

Evidence on plea of assignment.] In debt for rent against the lessee, who has pleaded an assignment and acceptance of the assignee before the rent incurred, the assignment must be proved, and also the acceptance of the assignee as his tenant, by the lessor; *Marsh v. Brace, Cro. Jac.* 334; if the action is against the assignee, he may plead the assignment without any statement of an acceptance. *Tongue v. Pitcher*, 3 *Lev.* 295. *Com. Dig. Debt*, (*F.*)

DEBT FOR DOUBLE VALUE.

In an action of debt for double value, the plaintiff must prove the demise, the determination of the term, the holding over, the demand and notice in writing given to the defendant, and the amount of the double value claimed, or such of those facts as are denied by the pleadings.

By statute 4 G. 2, c. 28, s. 1, in case any tenant or tenants for life, lives, or years, or other persons who shall come into possession of any lands, tenements, or hereditaments, by, from, or under, or by collusion with such tenant or tenants, shall wilfully hold over any lands, &c. after the determination of their term, and after demand made, and notice in writing given, for delivering the possession thereof, by his or their landlord or lessor, or the person or persons to whom the remainder or reversion of such lands, &c., shall belong, his or their agents, thereunto lawfully authorised, such persons so holding over shall, for and during the time he or they shall so hold over, or keep the person or persons entitled out of the possession of the said lands, &c. pay to the person or persons so kept out of possession, their executors, administrators, or assigns, at the rate of double the yearly value of the said lands, &c. for so long time as the same are detained.

Tenants in common cannot sue jointly in this action where there has been no joint demise. *Wilkinson v. Hall*, 1 *Bingh. N. C.* 713.

Proof of determination of term, and of the demand.] In general, the determination of the term will be proved by evidence of the service of a notice to quit upon the defendant; *see post in Ejectment*, and if a notice to quit be proved, it will not be necessary to show a demand, for the notice includes a demand. *Wilkinson v. Colley*, 5 *Burr.* 2694. The notice must be in writing. Where the defendant has held over, after the determination of a term certain, a demand of the possession must be proved, but it need not appear that the demand was made, on or before the expiration of the tenancy; *Cobb v. Stokes*, 8 *East*, 361; though the plaintiff will only be entitled to the double value from the time of the demand made, *ibid.*; and where the rent is reserved quarterly, and the demand is made in the middle of a quarter, the plaintiff cannot recover the single rent for the antecedent fraction of the quarter. *Ibid.* Where the notice was served upon the tenant, a feme sole, who married before the expiration of the year, it was held that the landlord might maintain debt against the husband, without making a demand of the possession from him, and that in such action it was not necessary to join the wife for conformity. *Lake v. Smith*, 1 *Bos. and Pul. N. R.* 174. A person appointed by the court of Chancery, to receive the rents and profits of the estate, is a sufficient agent within the statute to make the demand. *Wilkinson v. Colley*, 5 *Burr.* 2694.

Defence.

The defendant may plead that the plaintiff has waived the notice to quit and demand of possession; and where the plaintiff has accepted rent from the defendant, after the expiration of the notice to quit, it is a question for the jury, whether such rent was received in part satisfaction of the double value, or as a waiver of it; *Ryal v. Rich*, 10 *East*, 52; and where the landlord declared in debt, 1st for the double value, and 2d for use and occupation, and the tenant pleaded *nil debet* to the first count, and a tender of the single rent, before action brought, to the second, and paid the money into court, which the plaintiff took out of court, and proceeded, it was held that this was no waiver of the plaintiff's right to the double value, so as to be ground of nonsuit, but that it was a case to go to the jury; and that the plaintiff going on with the action, after taking the single rent out of court, was evidence to show, that he did not mean to waive his claim for the double value, but to take the single rent *pro tanto*. *Ibid.* A recovery in ejectment is no waiver of the landlord's right to the double value, for the time between the expiration of the notice to quit, and

the time of recovering possession under the ejectment. *Soulsby v. Neving*, 9 *East*, 310. A tenant who holds over, under a fair claim of right, will not be considered as wilfully holding over within the statute, though it appear eventually that he had no right. *Wright v. Smith*, 5 *Esp.* 203, 9 *East*, 312.

DEBT FOR DOUBLE RENT.

The proofs in this action are substantially the same as in the action of debt for the single rent.

By stat. 11 G. 2, c. 19, s. 18, if any tenant shall give notice of his intention to quit the premises holden by him at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof, at the time in such notice contained, then such tenant, his executors or administrators, shall thenceforward pay to the landlord double the rent or sum which he should otherwise have paid, to be levied, sued for, and recovered, at the times, and in the same manner as the single rent or sum, before the giving of such notice, could be levied, &c., and such double rent or sum shall continue to be paid during the time such tenant shall continue in possession.

The notice mentioned in the statute need not be in writing. *Timmins v. Rowlinson*, 3 *Burr.* 1603; but it must give a fixed time for quitting: thus a notice to quit, "as soon as the tenant can get another situation," does not render him liable on this statute, though he has got another situation. *Farrance v. Elkington*, 2 *Campb.* 591. The statute only applies to those cases in which the tenant has the power of determining his tenancy by a notice, and where he actually gives a valid notice sufficient to determine it. *Johnstone v. Huddlestone*, 4 *B. and C.* 922, 7 *Dow. and R.* 411, *S. C.*

DEBT FOR PENALTIES.

In an action of debt for penalties, the general evidence for the plaintiff is, proof of the commission of the act, upon which the penalty has accrued, and, if a time be limited by the statute for bringing the action, that the action was brought within that time; and where the venue is local, that the action is brought in the right county, or such of these matters as are denied by the pleadings.

In the statement of the offence, it is frequently necessary to allege a contract, and such contract must be proved as laid. Thus in an action of debt, for selling coals by an illegal measure, where it was stated that the coals were sold by the de-

fendant to A., and it was proved that they were sold to A. and B., Lord Ellenborough held that the declaration did not state the contract as it was, and that the variance was fatal. *Parish v. Burwood*, 5 *Esp.* 33. *Everett v. Tindall*, 5 *Esp.* 169. So where, in an action on the lottery acts, the declaration stated that the defendant insured one number for 43*l.* 2*s.*, but it appeared in evidence that several numbers had been insured for that sum, the variance was held fatal. *Phillips v. Da Costa*, 1 *Esp.* 59. So in a declaration for usury, a variance in the day of lending, though laid under a *videlicet*, is fatal. *Partridge v. Coates*, *R. and M.* 153. *Fox v. Keeling*, 4 *Nev. and M.* 523, *ante* 66. But in a penal action for exercising a trade without having served an apprenticeship, the plaintiff is not obliged to prove that the defendant used the trade all the time laid in the declaration, it being averred that he forfeited 40*s.* for each month. *Powell v. Farmer*, *Peake*, 57. Where the penalty arises from the commission of an act without a legal qualification, the existence of which qualification is peculiarly within the knowledge of the defendant, it will not be necessary for the plaintiff to show the want of qualification. *Apoth. Co. v. Bentley*, *R. and M.* 159, *ante p.* 69.

Evidence of commencement of the action.] Since the uniformity of process act the writ is, in all cases, the commencement of the action, and on production will show the day on which it issued. The return of the writ need not be shown. *Parsons v. King*, 7 *T. R.* 6, 2 *Saund. d* (*n*). But where a writ has been issued within the time, and not served, and an *alias* issues, after the time elapsed, it is then necessary to show the first writ returned, in order to warrant the second. *Harris v. Woolford*, 6 *T. R.* 617. Where a *testatum special capias* was issued in Michaelmas term, and an *alias testatum capias* in Easter following, but there was no writ in Hilary term, it was held that this was a sufficient commencement of the suit in Michaelmas term to take the case out of the statute of limitations, the suit being actually although irregularly commenced within six years, and that the continuance in Hilary term might be supplied at any time. *Beardmore v. Rattenbury*, 5 *B. and A.* 452. *See Gregory v. Hurrill*, 5 *B. and C.* 341. *Stanway v. Perry*, 2 *B. and P.* 157. Where the plaintiff's counsel had neglected in the first instance to prove the commencement of the suit, Lord Kenyon ruled that he might prove it at any stage of the cause. *Maugham v. Walker*, *Peake*, 163; *but see Tovey v. Palmer, infra.*

Evidence of locality of action. In general in an action upon a penal statute the plaintiff must prove that the cause of action arose in the county in which the venue is laid. *See* 31 *Eliz. c.* 5, *s.* 2, *Tidd*, 431. The offence of selling coals of a different

description from those contracted for, upon statute 3 G. 2, c. 26, s. 4, is complete in the county where the coals are delivered, and not where they were contracted for, the contract not being for any specific parcel of coals, but for a certain quantity of a certain description. *Butterfield v. Windle*, 4 *East*, 385. In an action on 1 and 2 P. and M. c. 12, for driving a distress out of the hundred into another county, the venue may be laid in either county. *Pope v. Davis*, 2 *Taunt.* 252. An action for the penalties of usury on the statute 12 Anne, st. 2, c. 16, can only be brought in the county where the offence is completed, and therefore where the contract is made in one county, and the usurious interest is received in another, the venue must be laid in the latter county. *Pearson v. Gouran*, 3 *B. and C.* 700. Where the plaintiff had closed his case, but had omitted to prove the offence committed in the proper county, Lord Ellenborough refused afterwards to allow him to give evidence of it, although in fact he was prepared to do so. *Tovey v. Palmer, Esp. on penal stat.* 142; *but see Maugham v. Walker, Peake*, 163, *supra.*

Defence.

The plea of *nil debet* being abolished by the rules of H. T. 4 W. 4, all matters of defence in this action must be specially pleaded, " the defendant shall deny specifically some matter of fact alleged in the declaration, or shall plead specially in confession and avoidance."

The period of limitation in actions of debt for penalties given to the parties grieved, is regulated by the 2 and 3 W. 4, c. 71, s. 3, *vide ante p.* 400.

As to witnesses entitled to share in the penalty, *see ante p.* 107.

EJECTMENT.

General Evidence for the Plaintiff.

It may be convenient to mention in this place, that the rules of H. T. 4 W. 4, do not apply to the action of ejectment. *Doe v. Williams*, 4 *Nev. and M.* 259.

The lessor of the plaintiff in ejectment must in general prove: 1, A sufficient title in himself at the time of the demise stated; 2, That his title is a *legal* one; 3, In some cases an entry to avoid a fine; 4, In some cases an actual ouster by the defendant; 5, The local situation of the premises, where it is described.

He is not bound, as part of his case, to produce the rule to confess lease, entry, and ouster. *Doe v. Raby*, 2 *B. and Ad.* 948, overruling *Doe v. Lamble, M. and M.* 237. The only instance in which it can now be necessary to produce the rule is

where the plaintiff, directing his case to certain premises, the other party contends that he does not defend for those; there it may be requisite to produce the rule to show for what he does defend. *Per Lord Tenterden*, 2 *B. and Ad.* 949.

Proof of a sufficient title.] The plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's. *Martin v. Strachan*, 5 *T. R.* 107 (*n*). Twenty years' adverse possession, since the statute of limitations, 21 Jac. 1, c. 16, is, as it seems, a sufficient title for the plaintiff in ejectment. *Stocker v. Berney*, 1 *Lord Raym.* 741, 2 *Salk* 421, *S. C. recog. Cholmondeley v. Clinton*, 2 *Jac. and Walk* 156. *B. N. P.* 103. *See also* 2 *Saund.* 175 (*n*). *Taylor v Horde*, 1 *Burr.* 119. *Ashbrittle v. Wyley*, 1 *Str.* 608. *R. v. Cold Ashton*, *Burr. Sett. Ca.* 444. 3 *Evans' Stat.* 290. 2 *Prest. Abs.* 294, 421. *Goodtitle d. Parker v. Baldwin*, 11 *East*, 488. And where the plaintiff proved twenty years' possession, and the defendant proved that he had been subsequently in possession for ten years, it was held that the plaintiff was entitled to recover. *Doe v. Cooke*, 7 *Bingh.* 346. It is no answer to an ejectment founded on a twenty years' adverse possession, that such possession was in continuation of that of a sister who entered by abatement into the land to which her elder brother (whose issue was alive) was entitled as heir, and who died more than twenty years before the ejectment was brought. *Doe v. Lawley*, 3 *Nev. and M.* 331. Against a wrong-doer mere possession is a sufficient title Thus, where the plaintiff proved a lease of the premises to himself and a year's possession, and that the defendant took forcible possession, this was held sufficient, without proof of the title of the demising parties. *Doe v. Dyeball*, *M. and M.* 346. A tenant who has come in under, or paid rent to his landlord, cannot dispute his title, *vide post*, and a party may be estopped from disputing the title of another in this action, by referring the question of the right to the land to an arbitrator, who awards in favour of the lessor of the plaintiff. *Doe d. Morris v. Rosser*, 3 *East*, 15, *sed vide Chamb. Landl. and Ten.* 267. *Hunter v. Rice*, 15 *East*, 100. But in ejectment on a demise by *A. and B.*, it is no defence to show an ejectment by the defendant *against A.*, a reference of the cause, an award in favour of the defendant, and a writ of possession executed. *Doe v. Webber*, 1 *Ad and Ell.* 119, 3 *Nev. and M.* 746, *S. C.*

The lessor of the plaintiff must also show that he had a right of entry at the time of the demise, for if his entry is barred by the statute of limitations, or otherwise, he cannot recover in this action. If his title to enter, therefore, has accrued more than twenty years before the bringing of the action, and there has been an adverse possession during that period, he must be prepared to show himself within some of the exceptions of the statute, *vide post*. If the lessor of the

plaintiff had a right of entry at the time of the demise laid, it will be sufficient, though the right be devested before trial, for the plaintiff has a right to proceed and recover damages for the trespass. *Co. Litt.* 285, *a.* *Doe v. Black*, 3 *Campb.* 447.

It must also be proved that the lessor of the plaintiff had a sufficient title at the time of the demise laid in the declaration. *B. N. P.* 105. An heir at law may lay the demise on the day on which his ancestor died. *Roe v. Hersey*, 3 *Wils.* 274. And a posthumous son taking lands by way of remainder, under statute 10 and 11 W. 3, c. 16, may lay the demise on the day of his father's death. *B. N. P.* 105. Where a person comes lawfully into possession, as under a negotiation for a purchase or a lease, ejectment cannot be maintained until such possession has been determined by demand or otherwise; and therefore the demise must appear to be after the demand. *Right v. Beard*, 13 *East*, 210. And so where there has been a tenancy at will the demise cannot be laid on a day antecedent to the determination of the will. *Goodtitle v. Herbert*, 4 *T. R.* 680. But in ejectment by a mortgagee against a mortgagor in possession, the demise may be laid on a day anterior to the actual determination of the will. *Per Buller*, *J.*, *Birch v. Wright*, 1 *T. R.* 383, *vide post.* If a clause be inserted in the mortgage deed that the mortgagor shall continue in possession, until default made in payment of the mortgage-money, the demise must be laid on a day subsequent to the time of payment. 2 *Phill. Ev.* 255.

The demise must be framed according to the legal title of the lessors of the plaintiff, and therefore a joint demise by two persons is not supported by proving that they are entitled as tenant for life and remainderman, for the lease of the latter operates as a confirmation, not as a lease. *Treport's case*, 6 *Rep.* 13, *a.*; *and see Doe v. Adams*, 2 *Crom. and J.* 232. Jointenants and coparceners may either join or sever in the demise. Upon a several demise from each, the portion belonging to him may be recovered, and if several jointenants or coparceners join, and declare on the separate demises of each, the whole may be recovered. Where a joint demise, only, was laid, Taunton, J., refused to allow an amendment, under 3 and 4 W. 4, c. 42, s. 23, by substituting a several demise. *Doe v. Errington*, 1 *Moo. and Rob.* 343. *Doe v. Read*, 12 *East*, 57. *Doe v. Fenn*, 3 *Campb.* 190. The payment of an entire rent to the common agent of the lessors of the plaintiff is *primâ facie* evidence of their joint title. *Doe v. Grant*, 12 *East*, 221. Tenants in common must make several demises in ejectment. *Heatherly v. Weston*, 2 *Wils.* 232. *Co. Litt.* 200, *a.* *See* 12 *East*, 61. Where a corporation sue in ejectment the demise is stated to be by deed, but no deed need be proved; *Furley v. Wood*, 1 *Esp.* 198; for the lease is admitted by the consent rule.

Plaintiff must prove a legal title.] The plaintiff must prove a *legal* title, an equitable title is not sufficient. *Roe v. Read*, 8 *T. R.* 118, 123. *Doe v. Wroot*, 5 *East*, 138. In conveyances to uses, where a use is limited upon a use, the latter use is not executed, but the legal estate is vested in him to whom the first use was limited. *Tyrrel's case, Dyer*, 155. *Gilb. Us.* 161. The statute of uses does not extend to copyholds. *Gilb. Ten.* 182. Nor to conveyances of *existing* terms of years. *Dillon v. Fraine, Poph.* 70, 76. 2 *Inst.* 671. *Gilb. Us.* 198.

With regard to devises in trust, the rule is, that where something is to be done by the trustees which makes it necessary for them to have the legal estate, such as the payment of the rents and profits to another's separate use, or of the debts of the testator, or to pay rates and taxes, and keep the premises in repair, or the like, the legal estate is vested in them, and the grantee or devisee has only a trust estate. 2 *Saund.* 11, *b* (*n*). *Kenrick v. Beauclerk*, 3 *B. and P.* 178. *Nevill v. Saunders*, 1 *Vern.* 415. *Say and Sele v. Jones*, 3 *Vin. Ab.* 262. *Harton v. Harton*, 7 *T. R.* 652. *Shapland v. Smith*, 1 *Br. C. C.* 75. *Bagshaw v. Spencer*, 1 *Coll. Jur.* 378. So it is said by Mr. Justice Bayley, *Houston v. Hughes*, 6 *B. and C.* 421, that where an estate is given to trustees and their heirs indefinitely, the trustees will take the fee, if the purposes of the trust require that they should have the absolute property in them, or that they should take it for an indefinite period of time, unless a contrary intent is manifested on the face of the will. The same rule of construction is adopted in cases of deeds in trust to sell. *Keene d. Lord Byron v. Deardon*, 8 *East*, 248. But a mere charge for the payment of debts will not give the trustees the legal estate, unless the testator intends that they shall be active in paying the debts. *Kenrick v. Beauclerk*, 3 *B. and P.* 175. A trust to *receive* the rents and profits, and *pay* them over, vests the legal estate in the trustee; a trust to *permit* and *suffer* the *cestui que trust* to *receive* the rents and profits, vests it in the *cestui que trust*. *Broughton v. Langley*, 1 *Lutw.* 814, 823, 2 *Lord Raym.* 873, *S. C. Doe v. Biggs*, 2 *Taunt.* 109. *Fearne*, 159. *Fletcher, on the legal Estate of Trustees, p.* 30. Where an estate is devised to trustees for particular purposes, the legal estate is vested in them as long as the execution of the trust requires it, and no longer; and as soon as the trusts are satisfied it will vest in the person beneficially entitled. *Per Bayley, J., Doe v. Nicholls*, 1 *B. and C.* 342; *and see Doe v. Simpson*, 5 *East*, 171. *Fletcher, on the legal Estate of Trustees, p.* 50.

In certain cases where the legal estate has been vested in a trustee, and there is no direct evidence of a conveyance or surrender to the *cestui que trust*, a jury may presume such conveyance or surrender. *Lade v. Holford, B. N. P.* 110.

Goodtitle v. Jones, 7 *T. R.* 45. Thus, where an estate is directed to be conveyed, a jury may, within four years from the time when the estate was directed to be conveyed, presume that it has been so conveyed by the trustee. *Doe v. Slade,* 4 *T. R.* 682. So where it is for the interest of the owner of the inheritance that a satisfied term should be considered as surrendered, and it appears that no beneficial purpose can be answered by the continuance of the term, a surrender may be presumed. *Doe v. Wright,* 2 *B. and A.* 720. *Sed vide Doe v. Plowman,* 2 *B. and Adol.* 573, *post.* Thus a term of 1000 years was created by deed in 1717, and in 1735 was assigned for the purpose of securing an annuity to A., and after that, to attend the inheritance; A. having died in 1741, and the estate having remained undisturbed in the hands of the owner of the inheritance and his devisee from 1735 to 1813, without any notice having been in the mean time taken of the term, except that in 1801 the devisee in whose possession the deeds creating and assigning it were found covenanted to produce those deeds when called for, it was held that under these circumstances the jury were warranted, in an ejectment brought by the heir at law, in presuming a surrender of the term. *Ibid.* Again in the case of a satisfied term, where acts are done or omitted by the owner of the inheritance, and persons dealing with him, as to the land, which ought not reasonably to be done or omitted, if the term existed in the hands of the trustee, and there does not appear to be any thing to prevent a surrender from having been made, those acts are evidence from which a jury may presume such surrender. *Doe v. Hilder,* 2 *B. and A.* 791. *Sed vide Doe v. Plowman,* 2 *B. and Adol.* 573, *post.* Thus a term of years was created in 1762, and assigned over to a trustee in 1779, to attend the inheritance. In 1814 the owner of the inheritance executed a marriage settlement, and in 1816 conveyed his life interest in the estate to a purchaser as a security for a debt; but no assignment of the term or delivery of the deeds relating to it took place on either occasion. In 1819 an actual assignment of the term was made by the administrator of the trustees in 1779, to a new trustee for the purchaser in 1816. Under these circumstances it was held, in an ejectment brought by a prior incumbrancer against the purchaser, that the jury were warranted in presuming that the term had, previously to 1819, been surrendered. *Ibid.; but see Aspinall v. Kempson, Sugd. V. and P.* 427.

On the other hand, where a term of years becomes attendant upon the inheritance, either by operation of law, or by a special declaration, upon the extinction of the objects for which it was created, the enjoyment of the land by the owner of the reversion, thus become the *cestui que trust* of the term, may be accounted for by the union of the two characters of

cestui què trust and inheritor; and there appears therefore to exist no circumstance from which a jury can imply a surrender. *Doe v. Hilder*, 2 *B. and A.* 791. *Townsend v. Champernown*, 1 *Y. and J.* 544. The mere fact of a term being satisfied furnishes no ground from which the jury can presume it surrendered. *Evans v. Bicknell*, 6 *Ves.* 185. There ought to be some dealing with the term to authorise such a presumption. *Ibid. Cholmondeley v. Clinton, cited Sugd. V. and P.* 426. Where a term has been *expressly* assigned to attend the inheritance, and there has been no act or omission, inconsistent with the existence of the term, there is less ground to presume a surrender from the mere lapse of time and silence of the party who possesses the inheritance. *See Sugd. V. and P.* 389, 391. In 1772 a term of 1000 years was created by deed to secure 5000*l.*; and in 1787 the principal and interest being paid, the residue of the term was assigned in trust for the devisees of the person who created the term. In 1789 the premises were conveyed to a purchaser, and the residue of the term assigned in trust for the purchaser, and in the mean time to attend the inheritance. The purchaser entered and continued to possess till her death. In 1808 she executed a settlement, reserving a power to devise, and in 1813 she devised the estate. The term was not mentioned in the settlement or will. In ejectment by her heir at law, it was held, that there was no circumstances from which a surrender of the term could be presumed. *Doe v. Plowman*, 2 *B. and Adol.* 573. So the recognition of the term as subsisting at a late period, *Doe v. Scott*, 11 *East*, 478, the fact that it would have been contrary to the duty of the trustees to surrender the estate, *Keene v. Deardon*, 8 *East*, 267, or that the original enjoyment of the party who sets up the presumed conveyance was consistent with the fact of there having been no conveyance, *Doe v. Reed*, 5 *B. and A.* 237, are all circumstances from which a jury may infer that no conveyance has taken place. Where A. devised an estate to trustees for years, with remainder to B., and B. eighteen years after the death of A., treated the estate as his freehold, and leased it for lives, it was held that the jury ought not to presume a surrender of the term. *Per Bayley, B.* "Is there any case where a surrender has been presumed within twenty years? I do not think that a jury ought to be required to presume what they do not believe. In the present case, if a surrender had really taken place, it must have been known to many individuals." *Day v. Williams*, 2 *Crom. and J.* 460. No case can be put in which any presumption has been made, except where a title has been shown by the party who calls for the presumption, good in substance, but wanting some collateral matter necessary to make it complete in point of form. *Per Tindal, C. J., Doe v. Cooke*, 6 *Bingh.* 179.

Plaintiff must show a legal title — answer by the defendant.] The defendant may disprove the legal title of the party through whom he and the lessor of the plaintiff claim, before the accruing of his own title. Thus, where the lessor claims under a lease from A. B. in 1818, and the defendant under a conveyance from A. B. in 1824, the defendant may show that, in 1818, A. B. had no power to make such lease. *Doe v. Powell*, 1 *Ad. and Ell.* 531. But where A., without title, entered upon land and built a cottage, and afterwards accepted a lease by indenture from B., and C., claiming the land as his own, paid A. 20*l*. to give up possession to him, it was held, in ejectment on the demise of B. against C., that A. had estopped himself from controverting the title of B., and that C. was bound by the estoppel, as having come in under and received possession from B. *Doe v. Mills*, 4 *Nev. and M.* 25, 1 *Moo. and Rob.* 385, *S. C.*

The defendant, as already stated, (*ante p.* 188), may show that the title of the lessor of the plaintiff has expired. Thus, he may show that he has conveyed away all his legal estate by way of mortgage, though the mortgagee has never enforced his rights. *Doe d. Marriott v. Edwards*, 5 *B. and Ad.* 1065, 6 *C. and P.* 208, *S. C.*

Entry to avoid a fine levied with proclamations.] Although by the statute 4 and 5 W. 4. c. 92, s. 2, no fine or recovery shall be suffered after the 31st of October, 1834, other modes of assurance being substituted by that act, yet with regard to fines levied previously, the old law remains in force, and it is necessary therefore to state the decisions with regard to avoiding such fines by entry. It is never necessary to prove an actual entry made before the ejectment commenced, except in the case of a fine levied with proclamations. *Oates v. Brydon*, 3 *Burr.* 1897. *Doe v. Watts*, 9 *East*, 19. To avoid a fine levied without proclamations no actual entry need be proved. *Jenkins v. Pritchard*, 2 *Wils.* 45. And so where the ejectment is brought before all the proclamations have been made. *Doe v. Watts*, 9 *East*, 17. Where the fine is levied by a person who has the tortious fee, as a disseisor, an entry is necessary. *Fermor's case*, 3 *Rep.*79, *a*. So where a termor makes a feoffment, and levies a fine, but the entry in such case may be within five years next after the fine levied, or next after the expiration of the term. *Whaley v. Tancred*, *T. Raym.* 219. So where the fine is levied by tenant for life, the entry may either be within five years after the levying of the fine, or after the expiration of the life estate. *Dyer*, 3 *b* (*margin*), *Smy v. June*, *Cro. Eliz.* 220. *Goodright v. Forrester*, 8 *East*, 552. A fine levied by tenant in tail in possession creates a discontinuance, and no entry can be made, and therefore no ejectment lies. *B. N. P.* 99. If levied by tenant in tail in

remainder, it does not devest the estate in remainder, and no actual entry is necessary. *Rowe v. Power*, 2 *N. R.* 1. *Rowe v. Elliott*, 1 *B. and A.* 85. Where a fine is levied by a termor (without a previous feoffment), the reversioner need not prove an actual entry before bringing the ejectment. *Focus v. Salisbury*, *Hard.* 401. *Doe v. Perkins*, 3 *M. and S.* 271. A fine levied by one parcener, jointenant, or tenant in common, previously to an actual ouster, will not devest his companion's estate; and though the latter be afterwards ousted by the former, he may maintain ejectment without proving an actual entry. *Ford v. Grey*, 1 *Salk.* 285. *Peaceable v. Read*, 1 *East*, 568. A fine levied by a reversioner or remainderman devests no estate, and no entry is necessary to avoid it. *Roe v. Elliot*, 1 *B. and A.* 85. In ejectment by a mortgagee no entry need be proved to avoid a fine levied by the mortgagor while in possession. *Freeman v. Barnes*, 1 *Lev.* 272. *Hall v. Doe*, 5 *B. and A.* 687. The ejectment must be brought within one year after the entry to avoid the fine, by 4 Anne, c. 16, s. 16.

Actual ouster.] The ouster, as well as the lease and entry, is in general confessed by the consent rule; but where the action is brought by one jointenant, parcener, or tenant in common, against his companion, the court will allow the defendant to enter into a special rule, confessing the lease and entry, and also the ouster, if an actual ouster of the plaintiff's lessor by the defendant shall be proved at the trial, but not otherwise. Where a tenant in common had been in the sole and uninterrupted possession for thirty-six years, without account to or demand by his companion, this was held to be ground for a jury to presume an ouster. *Doe v. Prosser*, *Cowp.* 217. So if one tenant in possession claims the whole, and denies possession to the other, this being beyond the mere act of receiving the whole rent, is evidence of an ouster. *Doe v. Bird*, 11 *East*, 49. Before the late statute, it was held that a bare perception of the profits by one tenant in common for twenty-six years, was no ouster. *Fairclaim v. Shackleton*, 5 *Burr.* 2604. And where one tenant in common levied a fine and took the rents and profits afterwards without account, for nearly five years, it was held that there was no evidence from which a jury could presume (contrary to the justice of the case) an ouster of the other tenant. *Peaceable v. Read*, 1 *East*, 568. By the statute 3 and 4 W. 4, c. 27, s. 12, it is enacted, that where any one or more of several persons entitled to any land, or rent, as coparceners, jointenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits, or of such rent for his or their own benefit, or for the benefit of any other

person or persons, other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt, shall not be deemed the possession or receipt, of or by such last-mentioned person or persons, or any of them. If a special consent rule has not been entered into, the common consent rule will be evidence of an actual ouster, so as to enable the jointenant to recover. *Oates v. Brydon*, 3 *Burr.* 1895. *Doe v. Cuff*, 1 *Campb.* 173.

The defendant's possession of the premises.] It was formerly necessary to prove the tenant in possession of the premises for which the action was brought; but such proof is now rendered unnecessary by rules M. 1 G. 4, K. B. and H. 1 and 2 G. 4, C. B., by which the defendant must consent in the consent rule, that he (if he defends as tenant, or in case he defends as landlord, that his tenant) was at the time of the service of the declaration in possession of such premises as he intends to defend for.

The local situation of the premises.] The declaration need not state the parish in which the premises are situated, but if it do, a variançe will be fatal. *Goodtitle v. Lammiman*, 2 *Campb.* 274. Where they were described as lying in the parish of *Farnham*, and proved to be in the parish of Farnham *Royal*, it was held to be no variance, unless it could be proved that there were two Farnhams. *Doe v. Salter*, 13 *East*, 9. And where they were described as situate in the parish of *Westbury*, and it was proved that there were two parishes of *Westbury, viz.* Westbury *on Tyrm*, and Westbury *on Severn*, this was held no variance. *Doe v. Harris*, 5 *Maule and S.* 326. Where the premises were described as situate in the parish of A. and B. and at the trial it appeared that some of the lands lay in the parish of A., and some in the parish of B., and that there was no parish of A. and B., and the plaintiff had a verdict, the court refused a rule for a new trial. *Goodtitle v. Walter*, 4 *Taunt.* 671 But in a similar case, Parke, B., held the variance fatal, but permitted an amendment. *Doe d. Marriot v. Edwards*, 1 *Moo. and Rob.* 319. If the premises are described to be in *St. Mary, Lambeth*, and by the evidence appear to be in *Lambeth*, it not being proved that these are distinct parishes, it seems to be no variance. *R. v. Glossop*, 4 *B. and A.* 619. *Kirtland v. Pounsett*, 1 *Taunt.* 570. So where the premises were laid to be in the parish of St. Luke, in the county of Middlesex, and it appeared that there were two parishes of St. Luke in that county, the one *St. Luke, Chelsea*, and the other *St. Luke, Old Street*, usually called St. Luke, Middlesex, (where the premises in fact were,) the description was held sufficient. *Doe v. Carter*, 1 *Y. and J.* 492, *supra*.

Ejectment by Landlord.

In ejectment by a landlord, the lessor of the plaintiff must prove the demise, and its expiration, either by effluction of time, notice to quit, or forfeiture. If a demise from the lessor of the plaintiff to the defendant be proved, no other evidence of title need be given, as the tenant cannot dispute the title of his landlord. *Doe v. Samuel*, 5 *Esp.* 174. *Gravenor v. Woodhouse*, 1 *Bingh.* 43, *ante p.* 184. So in ejectment by the reversioner after an estate for life, the tenant who has paid rent to the tenant for life, cannot dispute the title of the reversioner. *Doe v. Whitroe, D. and Ry. N. P. C.* 1. If it appears at the trial that the tenant or his attorney has been served with due notice, the plaintiff shall not be nonsuited for default of the defendant's appearance, or of confession of lease, entry, or ouster, but the production of the consent rule and undertaking of the defendant shall be sufficient evidence of lease, entry, and ouster. 1 G. 4, c. 87, s. 2. *See post,* "*Trespass for Mesne Profits.*"

Proof of the tenancy.] If the demise is by deed or in writing, it must be proved by the production of the original, or of a counterpart original. *Roe v. Davis*, 7 *East*, 363. If in the defendant's possession, notice to produce it should be given, *ante p.* 3. Where the lease is by parol, it may be proved by a person who was present at the making, or by an admission of the defendant. 2 *Phill. Ev.* 221. And though the terms of the lease have been committed to writing, (but not signed by the parties), they may still be proved by parol. *R. v. St. Martin, Leicester*, 4 *Nev. and M.* 202, *ante p.* 10.

Evidence of a demise from year to year may, in the absence of other proof, be gathered from the payment and receipt of rent. Thus, if the tenant for life leases and dies, and the remainderman receives rent from the tenant, a tenancy from year to year is created. *Sykes v. Burkitt, cited* 1 *T. R.* 161. *Bishop v. Howard*, 2 *B. and C.* 100. So where the party is let into possession under a lease, void by the statute of frauds, payment and receipt of rent will be evidence of a tenancy from year to year, regulated by the covenants and conditions of the void lease. *Doe v. Bell*, 5 *T. R.* 471. So where he agrees to hold over after the expiration of a written lease, at an advanced rent, he will be presumed to hold upon the terms of the former lease. *Digby v. Atkinson*, 4 *Camph.* 275. So where the party is let into possession, and pays rent under an agreement for a lease, a tenancy is created on the terms of the lease. *Mann v. Lovejoy, R. and M.* 355. *Knight v. Bennett*, 3 *Bingh.* 361. *Doe v. Stratton*, 4 *Bingh.* 446. So also if, being in possession under such an agreement, he acknowledges that half a year's rent is due. *Cox v. Bent*, 5 *Bingh.* 185. *See Free-*

man v. Jury, M. and M. 19, *ante p.* 187. *Regnart v. Porter,* 7 *Bingh.* 451, *and post.* But where a person comes in as undertenant, and a lease is afterwards granted to the tenant, with the terms of which the undertenant is unacquainted, the latter, in holding over, is not bound by the terms of the lease, though it would be otherwise if he had come in after the lease made. *Torriano v. Young,* 6 *C. and P.* 8. A tenancy may also be implied from other circumstances besides the payment or admission of rent due. Thus where the tenants of glebe lands remained in possession for eight months after the death of the incumbent, it was held that, after such a lapse of time, it was to be presumed that the new incumbent had assented to the continuance of the tenancy on the same terms as before, and that a notice to quit was necessary. *Doe v. Somerville,* 6 *B. and C.* 126.

A demise "not for one year only, but from year to year," has been held to constitute a tenancy for two years at least, not determinable by a notice to quit at the expiration of the first year. *Denn v. Cartwright,* 4 *East,* 31. So a demise "for a year and afterwards from year to year," is a demise for two years; *Birch v. Wright,* 1 *T. R.* 380; but where the demise was "for twelve months certain, and six months' notice afterwards," Lord Ellenborough held that the tenant was at liberty to quit at the end of twelve months, giving six months' previous notice. *Thompson v. Maberly,* 2 *Campb.* 573.

Where a tenant enters under an agreement for a lease for seven years, which is never executed, he is not entitled to notice to quit at the end of the seven years. *Doe v. Stratton,* 4 *Bingh.* 446.

Leases or agreement for leases.] A question frequently occurs, whether the instrument produced is evidence of an actual demise or of an agreement to demise merely. Upon a review of the cases it seems that words of present demise, as, "I demise," or future words conferring a right of enjoyment, as that the party "shall hold and enjoy," are evidence of an actual lease. *Harrington v. Wise, Cro. Eliz.* 486. *Baxter v. Brown,* 2 *W. Bl.* 973. *Poole v. Bentley,* 12 *East,* 168. *Barry v. Nugent,* 5 *T. R.* 165. *See also Wright v. Trezevant, M. and M.* 231. And the mere stipulation that a lease shall at a future time be executed, which is considered in the light of a covenant for more formal assurance, will not alter the effect of such words. *Ibid. See Pinero v. Judson,* 6 *Bingh.* 210; *and Doe v. Ries,* 8 *Bingh.* 178. The word *agree* will not of itself exclude the inference of the present demise, where there is nothing else to show that such a demise was not intended. *Per Tindal, C. J., Stamforth v. Fox,* 7 *Bingh.* 592. But where on the face of the instrument it is evident that a future lease is contemplated (though it be not expressly provided for), and

at the same time various terms of the tenancy remain to be ascertained, then, though there be words of present demise, the instrument will operate as an agreement only. *Morgan v. Bissell*, 3 *Taunt.* 72. A landlord and tenant, between whom there was a subsisting tenancy, agreed in writing for the letting of the farm upon different terms, the amount of the rent to be settled by valuation, and the tenant to find sureties for his paying the rent. The amount was not settled, and the sureties were not given. It was held, that the instrument, although it contained words of present demise, did not operate as a lease, or alter the terms of the existing tenancy. *John v. Jenkins*, 1 *Crom. and Mee.* 227. But if the terms of the lease are ascertained by the agreement, and there are words of present demise, it will operate as a lease; *Doe v. Ries*, 8 *Bingh.* 182; though the preparation of a future lease is provided for. *Warman v. Faithful*, 3 *Nev. and M.* 137. Again, where it is stipulated that the lessee shall do some act upon the premises, before the execution of a formal lease, it is evidence of an intention to make a present demise. *Poole v. Bentley*, 12 *East*, 168, 13 *East*, 19. And a stipulation that the agreement shall be considered binding until one fully prepared can be produced, is evidence of the same intent. *Ibid. Doe v. Groves*, 15 *East*, 244. On the other hand, if a forfeiture would be incurred by holding the instrument to be a lease, it is to be presumed that the intention of the parties was to make an agreement only. *Doe v. Clare*, 2 *T. R.* 739. And any words which show that a future act is to be done, before the relation of landlord and tenant commences, as the purchase and addition of another piece of land to the premises, will be evidence that the instrument was not intended to operate as a lease. *Doe v. Ashburner*, 5 *T. R.* 163. 12 *East*, 247. So where a stipulation is contained in the instrument, importing that something ulterior to the agreement is to be done, by way of a regular lease, this is evidence of an agreement merely. *Doe v. Smith*, 6 *East*, 530.

The law is well settled, that where there is any doubt as to the operation of the contract, the court must endeavour to discover the intention of the parties from the contents of the instrument; and if they see a paramount intention that the instrument shall operate as a lease, they must hold it to be such, although it may contain conflicting expressions. *Per Tindal, C. J., Pinero v. Judson*, 6 *Bingh.* 210. *See also Clayton v. Burtenshaw*, 5 *B. and C.* 41.

Tenancies at will, and cases of lawful possession.] Where a party has been let into possession pending a treaty for a purchase or a lease; *Goodtitle v. Herbert*, 4 *T. R.* 680; *Dunk v. Hunter*, 5 *B. and A.* 322; or under a void or imperfect lease or conveyance; *Litt. s.* 70; *Doe v. Fernside*, 1 *Wils.* 176; or

where, having been tenant for a term which has expired, he continues in possession, negotiating for a new one; *Doe v. Stennett*, 2 *Esp.* 717; in these and the like cases, where a party comes lawfully into possession, he is either tenant at will, or at all events in lawful possession, and cannot be ejected until such possession is determined by demand of possession, breaking off the treaty, or otherwise. *Right v. Beard*, 13 *East*, 210. *Denn v. Rawlins*, 10 *East*, 261. *Doe v. Jackson*, 1 *B. and C.* 448. So if the agent of a mortgagee applies to a person in possession of the land for rent, he cannot afterwards eject him without a demand of possession. *Doe v. Hall*, 7 *Bingh.* 322. Such demand of possession need not be expressed in precise and formal language. *Doe v. Price*, 9 *Bingh.* 356. It may be made upon the wife of the tenant at will on the premises. *Roe v. Street*, 4 *Nev. and M.* 42. Where the vendor of a term, before all the purchase-money was paid, agreed with the vendee that he should have possession of the premises till a given day, paying the reserved rent in the mean time, and that in case he did not pay the residue of the purchase-money on that day, he should forfeit the portion he had already paid, and not be entitled to an assignment of the lease, Lord Ellenborough held that this agreement operated like a clause of re-entry on a breach of covenant in a lease, and that the residue of the purchase-money not being paid on the appointed day, the vendee's interest thereupon ceased, and he might be ejected without any notice. *Doe v. Sayer*, 3 *Campb.* 8. And if a third person, under such circumstances, has come in as tenant to the vendee, ejectment may be maintained against such third person without notice. *Doe v. Boulton*, 6 *Maule and S.* 148. So where a man got into possession of a house without the privity of the landlord, and the parties afterwards entered into a negotiation for a lease, but disagreed about the value of the fixtures, Lord Ellenborough was of opinion that if this was a tenancy of any sort it was a tenancy at sufferance, and that a notice to quit was unnecessary. *Doe v. Quigley*, 2 *Campb.* 505; *and see Doe v. Lawder*, 1 *Stark.* 308.

Notice to quit, how proved.] Where the action is brought on the determination of the tenancy by notice to quit, the notice may be proved by a duplicate original, or examined copy, without a notice to produce the original. *Kine v. Beaumont*, 3 *B. and B.* 288. The notice delivered must be proved to have been properly signed, and if attested, the attesting witness must be called. *Doe v. Durnford*, 2 *Maule and S.* 62.

Notice to quit, at what time it must be given.] The notice to quit must be proved to have been given half a year (182 days) before the end of the year, except where the rent is

payable on the usual quarterly feast-days, when notice on one feast-day to quit on the next but one is sufficient. *Right v. Darby*, 1 *T. R.* 159. *Doe v. Green*, 4 *Esp.* 199. *Doe v. Kightley*, 7 *T. R.* 63. *Howard v. Wemsley*, 6 *Esp.* 53. Thus notice on the 28th of September to quit on the ensuing 25th of March is sufficient. *Roe v. Doe*, 6 *Bingh.* 574. But the period may be controlled by special agreement or local custom. *Roe v. Charnock*, *Peake*, 4. *Timmins v. Rowlinson*, 3 *Burr.* 1609. Where the tenancy is for less than a year, the length of the notice must be regulated by the letting, as a month's notice for a monthly letting. *Doe v. Hazell*, 1 *Esp.* 94, *see Wilson v. Abbott*, 3 *B. and C.* 88. The notice must expire at the expiration of the year; *Right v. Darby*, 1 *T. R.* 159; or where the tenancy is for less than a year, at the end of such shorter period, or some corresponding period. *Kemp v. Derrett*, 3 *Campb.* 510. On a letting from year to year, to quit at a quarter's notice, the notice must expire with the current year. *Doe v. Donovan*, 1 *Taunt.* 555. 2 *Campb.* 78. The tenancy will be taken *primâ facie* to commence from the day of the tenant's entry, and not with reference to any particular quarter-day. *Kemp v. Derrett*, 3 *Campb.* 510. But where a tenant entered in the middle of a quarter, and afterwards paid for that half-quarter, and continued to pay from the commencement of a succeeding quarter, he was held to be a tenant from the succeeding quarter-day. *Doe v. Johnson*, 6 *Esp.* 10. And the same was held by Best, C. J., in *Doe v. Stapleton*, 3 *C. and P.* 275. However, in another case where the tenant entered in the middle of a quarter, upon an agreement to pay rent quarterly, and for the half-quarter, it was left to the jury to say whether the party was tenant from the quarter-day prior to the time when he entered, or from the succeeding quarter-day, and under the direction of Lord Ellenborough the jury found that the tenancy commenced from the preceding quarter-day. *Doe v. Selwyn*, *Adams*, *Eject.* 129. If a tenant holds over and pays rent after the expiration of his lease, notice to quit must be given with reference to the time of entry under the original lease. *Doe v. Samuel*, 5 *Esp.* 173. So where a tenancy from year to year arises on payment of rent, by a tenant holding under a lease void by the statute of frauds, the void lease will regulate the time of the notice. *Doe v. Bell*, 5 *T. R.* 472, *and see ante p.* 187. Where the tenant enters upon different parts of the premises at different times, it is sufficient to give half a year's notice to quit, with reference to the original time of entry on the substantial part of the premises demised, which will be good for all. *Doe v. Snowden*, 2 *W. Bl.* 1224. *Doe v. Spence*, 6 *East*, 120. *Doe v. Watkins*, 7 *East*, 551. A holding from Michaelmas *primâ facie* signifies Michaelmas new style. *Doe v. Vince*, 2 *Campb.* 257. But where the tenancy, which was

by *parol*, was from Michaelmas to Michaelmas, Lord Kenyon permitted evidence to be given, that by the custom of the country, such a tenancy was considered to be from *old* Michaelmas. *Furley v. Wood, Runn. Ej.* 112, 1 *Esp.* 198, *S. C. Doe v. Benson,* 4 *B. and A.* 588. *See post.* And where the notice was delivered on September 27th, to quit "at the expiration of the term for which you hold the same," which notice was served personally on the tenant, who observed, "I hope Mr. M. does not mean to turn me out," Holroyd, J., permitted the lessor to prove that it was the general custom in that part of the country where the demised lands lay, to let the same from Lady-day to Lady-day, and that the defendant's rent was due at Michaelmas and Lady-day respectively; and he directed the jury to presume that this tenancy, like other tenancies in that part of the country, was from Lady-day to Lady-day. *Doe v. Lamb, Adams, Eject.* 316, *3rd ed.* So evidence of the intention of the parties is admissible. *Den v. Hopkinson,* 3 *D. and R.* 507. Where the tenancy is from old Michaelmas, a notice to quit at Michaelmas generally is good. *Doe v. Vince,* 2 *Campb.* 256. But where in a lease by *deed*, the tenancy was "from the feast of St. Michael," it was held that those words imported *new* Michaelmas, and could not be shown by extrinsic evidence to refer to *old* Michaelmas. *Doe v. Lea,* 11 *East,* 312. 4 *B. and A.* 589. *Smith v. Wolton,* 8 *Bingh.* 235. A notice to quit, not personally served upon the tenant, is not, of itself, even *primâ facie* evidence of the tenancy having commenced at that period of the year at which the notice expires. *Doe v. Calvert,* 2 *Campb.* 388. But if personally served upon the tenant, who does not object to it, it is *primâ facie* evidence of the commencement of the tenancy, if a specific time for quitting be mentioned. *Thomas v. Thomas,* 2 *Campb.* 648. *Doe v. Foster,* 13 *East,* 405. But such evidence may be rebutted by showing the period when the tenancy did in fact commence. *Oakapple v. Copous,* 4 *T. R.* 361. Where no specific time to quit was mentioned, but the notice was to quit "at the expiration of the current year," and a declaration in ejectment was served nearly a year afterwards, laying the demise half a year after the notice, and the tenant on being served with the declaration made no objection to the notice to quit, nor set up any right to a longer possession, Lord Ellenborough held that it was a question for the jury to determine, whether the tenant must not be understood as having admitted that the tenancy was determined by the notice. *Doe v. Woombwell,* 2 *Campb.* 559. So where a notice was given to a weekly tenant to quit "on Friday provided his tenancy expired on Friday, or otherwise at the end of his tenancy next after one week from the date of this notice," upon an ejectment brought after a sufficient time had elapsed, to cover a tenancy commencing on any day of

the week, the notice was held sufficient. *Doe v. Scott*, 6 *Bingh*. 362. If the tenant, upon application by his landlord, state his tenancy to have commenced on a particular day, he is concluded from disputing the accuracy of such statement. *Doe v. Lambley*, 2 *Esp*. 635. A receipt for rent, stating it to be a year's rent, up to a particular day, is *primâ facie* evidence of the commencement of the tenancy at that day. *Doe v. Samuel*, 5 *Esp*. 173.

Notice to quit, by whom to be given.] One of several jointenants may give notice, which will be good for his share. *Doe v. Chaplin*, 3 *Taunt*. 120. And where it imports to be given on behalf of himself and the other jointenants, it is good for the whole. *Doe v. Summersett*, 1 *B. and Ad*. 135. And where a notice was given, signed by a stranger, professing to be an agent for all the jointenants, their subsequent recognition of his authority, before ejectment brought, was held to be sufficient. *Goodtitle v. Woodward*, 3 *B. and A*. 689. But the authority of this case has been doubted (by Parke, J., 10 *B. and C*. 634). Nor would the ratification of the act on the day after the notice was given, or after the half year began to run, be sufficient, the notice being valid only from the time when it becomes the notice of the landlord. *Per Littledale, J. Id*. 633. It is indeed said that where the ejectment is brought by one person, the bringing of the action seems a sufficient recognition of his agent's authority; but that if the defendant holds under several landlords, the mere fact of bringing the ejectment in their names will hardly be sufficient, as it may have been brought by one of the lessors in the name of all, without any joint authority; some further evidence therefore seems necessary, such as proof by the attorney, that the action has been brought under the joint direction of the several lessors; 2 *Phill. Evid*. 230; and it should appear that the recognition was before the day of the demise laid, and before the time when the notice ought to begin to operate, 10 *B. and C*. 626. If the landlords are partners in trade, a notice, in the names of all signed by one only, is valid. *Doe v. Hulme*, 1 *Moo. and Rob*. 433. Where a lease for twenty-one years contained a proviso, that in case either landlord or tenant, or their respective heirs and executors, wished to determine it at the end of the first fourteen years, and should give six months' notice in writing *under his and their respective hands*, the term should cease; it was held that a notice to quit, signed by two only of three executors of the original lessor, to whom the freehold was devised as jointenants, expressing the notice to be given on behalf of themselves and the third executor, was bad, notwithstanding a subsequent recognition of it by the third executor. *Right v. Cuthell*, 5 *East*, 491. Where there was a proviso in a lease for twenty-one years, that if either of the parties should be

desirous to determine it in seven or fourteen years, it should be lawful for either of them, his executors or administrators, so to do upon twelve months' notice to the other of them, his heirs, executors, or administrators, it was held that the *devisee* of the lessor was entitled to give such notice. *Roe v. Hayley*, 12 *East*, 464. A receiver appointed by the court of Chancery with authority to let lands, has also authority to give a notice to quit. *Doe v. Read*, 12 *East*, 57. But a mere receiver of rent, as such, has no power to determine a tenancy. *Per Parke, J., Doe v. Walters*, 10 *B. and C.* 633. A verbal notice from a steward of a corporation is sufficient, without showing an authority under seal. *Roe v. Pierce*, 2 *Campb.* 96.

Notice to quit, to whom to be given.] Where the premises have been underlet, the subtenancy must be determined either by a notice from the lessor to the lessee, or from the lessee to the sublessee; a notice from the lessor to the sublessee is inoperative. *Pleasant v. Benson*, 14 *East*, 234. *Roe v. Wiggs*, 2 *Bos. and Pul. N. R.* 330. The notice from the lessor to the lessee should be served upon the latter, for where the service was upon a relation of the subtenant on the premises, Lord Ellenborough ruled the service to be insufficient, though the notice was addressed to the original lessee. *Doe v. Levi*, *Adams, Eject.* 115. Where A. had been tenant of certain premises, and upon his leaving them B. took possession, it was held that, in the absence of any evidence to the contrary, it might be presumed that he came in as assignee of A., although he had never paid rent, and that notice to quit was rightly given to B. *Doe v. Williams*, 6 *B. and C.* 41. Where a corporation is tenant, notice to quit should be given *to the corporation*, and served upon its officers. *Doe v. Woodman*, 8 *East*, 228.*

Notice to quit, form of.] The notice may be by parol, unless required to be in writing by agreement of the parties; *Timmins v. Rowlinson*, 3 *Burr.* 1603; *Doe v. Crick*, 5 *Esp.* 196; or by the provisions of a power. *Legg v. Benion*, *Willes*, 43. Though the courts listen with reluctance to objections to the form of the notice; *Doe v. Archer*, 14 *East*, 245; it must yet be explicit and positive, and not give the tenant an option of continuing under a new agreement; but a notice to quit, "or I shall insist on double rent," was held good, because the latter part of the notice evidently referred only to the penalty inflicted by 4 Geo. 2, c. 28, though the terms of that statute, which gives double the annual *value*, were mistaken. *Doe v. Jackson*, 1 *Dougl.* 175. If the notice had really contained the option of a new agreement, and said for instance, "*or else* that you agree to pay double rent," it would not have been good. *Per Lord Mansfield, ibid.* So where the notice

was to quit "on the 25th day of March, or 8th day of April next ensuing," and was delivered before new Michaelmas day, it was held good as intended to meet a holding, commencing either at new or old Lady Day, and not to give an alternative. *Doe v. Wrightman*, 4 *Esp.* 5. So in case of an obvious mistake the courts will hold the notice good, as where a notice was given at Michaelmas, 1795, to quit at Lady Day, "which will be in the year 1794," and the defendant was told at the time of the service of the notice, that he must quit at *next* Lady Day. *Doe v. Kightley*, 7 *T. R.* 63. So a notice dated 27th September, and served on the 28th, requiring the tenant to quit at Lady Day *next*, will be understood to mean Lady Day in the succeeding year. *Doe v. Culliford*, 4 *D. and R.* 248. A misdescription of the premises which can lead to no mistake will not be fatal, as where a house is described as "the Waterman's Arms," when in fact it is called "the Bricklayer's Arms," there being no sign called the Waterman's Arms in the parish. *Doe v.*——, 4 *Esp.* 185. As a lessor cannot determine the tenancy as to part of the things demised, and continue it as to the rest, the notice must include all the premises held under the same demise, and the courts will, if possible, give effect to the notice, so as to determine the tenancy altogether. *Doe v. Archer*, 14 *East*, 245. *Doe v. Church*, 3 *Campb.* 71. Where the notice is in writing, it is not necessary that it should be personally served upon the tenant; *Doe v. Wrightman*, 4 *Esp.* 5; and where it is directed to him by a wrong christian name, and he keeps it, the irregularity is waived. *Doe v. Spiller*, 6 *Esp.* 70. A notice to quit to a tenant of lands originally demised to the rector and churchwardens of a parish, and their successors in trust, signed by the rector and churchwardens, requiring the tenant to deliver up the premises to the rector and churchwardens, *for the time being*, is bad. *Doe v. Fairclough*, 6 *Maule and S.* 40. Where a tenant gives an irregular notice to quit, the landlord may treat it as a surrender. *Alderburgh v. People*, 6 *C. and P.* 212.

Notice to quit, service of.] It is sufficient if the notice is delivered and explained to the servant of the tenant at his dwelling-house, though the dwelling-house be not on the demised premises, such service affording presumptive evidence, that the notice came to the hands of the tenant, the servant not being called; *Jones v. Marsh*, 4 *T. R.* 464; and it is sufficient, though the tenant, by reason of absence, be not informed of it till within half a year of its expiration; *Doe v. Dunbar*, *M. and M.* 10; but it is not sufficient that the notice was left at the tenant's dwelling-house, without showing that it was delivered to a servant, &c. *Doe v. Lucas*, 5 *Esp.* 153. Service of the notice, on the premises, upon one of two jointenants who resides on the premises, is presumptive evidence of the notice

having reached the other jointenant. *Doe v. Watkins*, 7 *East*, 557. *Doe v. Crick*, 5 *Esp*. 196. If there be a sub-tenant, the notice from the original lessor must be served upon the lessee *Vide supra*. Notice to a corporation may be served upon its officers. *Doe v. Woodman*, 8 *East*, 228.

Notice to quit, waiver of.] The notice may be waived by the acceptance of rent after the expiration of the notice, but the rent must be received *quà* rent, which is a question for the jury. *Goodwright v. Cordwent*, 6 *T. R.* 219. *Doe v. Batten*, *Cowp*. 243. Where a quarter's rent, due after the expiration of the notice, had been received by the landlord's banker without any special authority, though the rent was usually paid to him, it was held, in the absence of any proof that the rent had come to the landlord's hands, not to be a waiver. *Doe v. Calvert*, 2 *Campb*. 387. A distress for rent accruing after the expiration of the notice, is a waiver. *Doe v. Willingale*, 1 *H. Bl.* 311. A recovery in an action for use and occupation, for a period subsequent to the expiration of the notice, seems to be a waiver. *Birch v. Wright*, 1 *T. R.* 387. The notice may be waived by a subsequent notice, for it recognises a tenancy subsisting after the expiration of the former. *Doe v. Palmer*, 16 *East*, 53. But where a second notice was given after the expiration of the first notice, and after the commencement of an ejectment, in which the landlord continued to proceed, notwithstanding the second notice, it was held no waiver, for it was not possible for the defendant to suppose that the plaintiff intended to waive the first notice, when he knew that the plaintiff was, on the foundation of that very notice, proceeding by ejectment to turn him out. *Doe v. Humphreys*, 2 *East*, 237. So where, after the expiration of a notice, the landlord gave a second notice, "I do hereby require you to quit the premises which you now hold of me, within 14 days from this date, otherwise I shall require double value," it was ruled that the latter notice, having for its object only the recovery of the double value, did not operate as a waiver. *Doe v. Steel*, 3 *Campb*. 115. So where no notice to quit was necessary, and a notice was given "to quit the premises which you hold under me, your term therein having long since expired," the court considered it a mere demand of possession, and not a recognition of a subsisting tenancy. *Doe v. Inglis*, 3 *Taunt*. 54. And where a landlord gave his tenant notice to quit, but promised not to turn him out, unless the premises were sold; and afterwards, and after the expiration of the notice to quit, the premises were sold, but the tenant refused to deliver up the possession, it was held that the promise was no waiver of the notice, and that the refusal of the tenant made him a trespasser from the expiration of the notice to quit. *Whiteacre v. Symonds*, 10 *East*, 13.

Notice to quit, when dispensed with.] When the tenant has attorned to another person, or done any act disclaiming to hold of his landlord, or has in any way put him at defiance, the landlord may treat him as a trespasser, and no notice to quit will be necessary; *B. N. P.* 96, *Doe v. Whittick, Gow*, 195; but a refusal to pay rent to a devisee under a contested will, the tenant declaring that he was ready to pay the rent to any person entitled to it, was held not to dispense with a notice to quit. *Doe v. Pasquali, Peake*, 196. So it has been ruled that the mere act of paying the rent to a third person does not operate as the forfeiture of a lease. *Doe v. Parker, Gow*, 180. But where a tenant pays rent to a third person, and allows him to mark and cut the trees, and these acts are done by a person claiming to be landlord, the submission to them by the tenant is an acknowledgment of the title of the claimant. *Per Lord Tenterden, Grubb v. Grubb*, 10 *B. and C.* 824. And were the defendant, who held under a tenant for life, received on his death a letter from the lessor of the plaintiff, claiming as heir and demanding rent, to which the defendant answered, that he held the premises as tenant to S., that he had never considered the lessor of the plaintiff as his landlord; that he should be ready to pay the rent to any one who should be proved to be entitled to it; but that, without disputing the lessor of the plaintiff's pedigree, he must decline taking upon himself to decide upon his claim, without more satisfactory proof in a legal manner, it was held that this was a disclaimer. *Doe v. Frowd*, 4 *Bingh.* 557. Where a tenant for years, delivered up possession of the premises, and also of the lease, in fraud of his landlord, to a person claiming under a hostile title, it was held to be a forfeiture of the lease. *Doe d. Ellenbrock v. Flynn*, 1 *Crom. M. and R.* 137., 4 *Tyr.* 619 *S. C.* So where the tenant said to the landlord, "I have no rent for you, for P. has ordered me to pay none," it was held to be a disclaimer. *Doe v. Pittman*, 2 *Nev. and M.* 678. A disclaimer must be before the date of the day of the demise; and an admission made after the day of the demise, of a disclaimer, must, to have the effect of determining a tenancy, amount to an admission that such disclaimer took place before the day of the demise. *Doe d. Lewis v. Cawdor*, 1 *Crom. M. and R.* 398.

Proof on forfeiture of the lease.] Where the lessor proceeds on the forfeiture of the lease, he must prove the demise, and the forfeiture incurred. The general rule is that a clause of re-entry is to be construed strictly. *Per Lord Tenterden, Doe v. Marchetti*, 1 *B. and Ad.* 720. Where the forfeiture is for the non-performance of a covenant, the lessor of the plaintiff must give some evidence of the non-performance of the covenant, and it will not in the first instance lie upon the defendant to prove a performance. *Doe v. Robson*, 2 *C. and P.*

245. The right of re-entry will appear on proof of the lease. Where, by the agreement of demise, it was "stipulated and conditioned that the tenant should not assign," &c., this was held to be a condition for the breach of which the lessor might maintain an ejectment. *Doe v. Watt*, 8 *B. and C.* 308. Where the lessee underlet, and in the under lease there was a proviso that, in case of breach of covenant, the *lessor and* lessee might enter, it was held that the lessee alone might take advantage of this proviso. *Doe v. White*, 4 *Bingh.* 276. If the proceeding be at common law for non-payment of rent, a regular demand of the rent with certain solemnities must be proved. 1 *Saund.* 287 (*n*). *Doe v. Paul*, 3 *C. and P.* 613. But by statute 4 G. 2, c. 28, where half-a-year's rent is in arrear, the lessor may, without any formal demand or re-entry, serve a declaration in ejectment; or in case it cannot be served, or no tenant be in possession, affix the same upon the door of the messuage, or if the ejectment be not for a messuage, upon some notorious place of the lands, &c., and such affixing shall be deemed legal service thereof; which service or affixing shall stand in the place of a demand or re-entry; and in case of judgment against the casual ejector, or nonsuit for not confessing lease, entry, and ouster, it shall be made appear to the court where the said suit is depending, by affidavit, or be proved upon the trial, if the defendant appears, that half-a-year's rent was due before the declaration was served, and that no sufficient distress was to be found upon the demised premises, countervailing the arrears then due, and that the lessor had power to re-enter, in such case the lessor shall recover judgment as if the rent in arrear had been legally demanded, and a re-entry made.

Where a lease contained a proviso for re-entry, in case the rent were in arrear 21 days after the day on which it was due, "being lawfully demanded," it was held (Lord Ellenborough *diss.*) to be within the statute, and that it was unnecessary to prove an actual demand. *Doe v. Alexander*, 2 *Maule and S.* 525. 5 *B. and A.* 385. Under this statute the landlord must be prepared with evidence of the service of the declaration in ejectment, or of the affixing of the same to the door of the messuage, &c., that half-a-year's rent was due, and that no sufficient distress was found on the premises. It is no ground of nonsuit that the declaration was served on a day subsequent to the day on which the demise was laid, that being after the rent became due. *Doe v. Shawcross*, 3 *B. and C.* 752. Evidence that there was no sufficient distress on the premises, on a certain day between the day when the rent became due and the service of the declaration, is sufficient *primâ facie* evidence. *Doe v. Fuchau*, 15 *East*, 286. It must appear that every part of the premises has been searched; *Rees v. King, cited* 2 *B. and B.* 514, *Forest*, 19; unless the tenant prevented the land-

lord from having access to the premises, as by locking the doors. *Doe v. Dyson, M. and M.* 77. A variance between the amount of rent proved to be due, and that demanded in the lessor of the plaintiff's particulars, is immaterial. *Jenny v. Moody*, 3 *Bingh.* 3. Where the action is brought on a proviso of re-entry in case of breach of covenant, and a particular of the breaches has been given, the proof must be according to the terms of the particular. *Doe v. Philips*, 6 *T. R.* 597. If brought on a forfeiture incurred by underletting, it is sufficient, *primâ facie*, to prove a third person in possession of the premises, acting and appearing as the tenant, and the declarations of such person are said to be evidence. *Doe v. Rickarby*, 5 *Esp.* 4; *sed vide Doe v. Payne*, 1 *Stark.* 86, *ante p.* 397.

A proviso in a lease giving a power of re-entry, if the tenant *make default in the performance* of any of the clauses by the space of thirty days *after notice*, does not apply to the breach of a covenant not to allow alterations in the premises, or permit new buildings to be made on them without permission. *Doe v. Marchetti*, 1 *B. and Ad.* 715.

Where a rent charge is granted, with power to the grantee, in case the rent shall be in arrear for a certain space of time, to enter and enjoy the lands charged, and to receive, &c., the rents, &c., for his own use, until satisfaction of the arrears, the grantee may, upon the rent becoming arrear, maintain ejectment against the terre-tenant, without proof of a previous demand of the rent. *Doe v. Horsley*, 3 *Nev. and M.* 567.

Forfeiture waived.] Where the lease is *voidable*, and not void, the defendant may show that the forfeiture has been waived. A lease for lives is *voidable* only, though the condition be that the lease "shall be void." 1 *Saund.* 287, *d* (*n*). In a lease for years if the condition be, that the lease "shall be void," it is *voidable* only at the option of the lessor; *Doe v. Bancks*, 4 *B. and A.* 401; *Reed v. Farr*, 6 *M. and S.* 121; so if the condition be, that "the lessor shall re-enter," the term is only voidable. *Pennant's case*, 3 *Rep.* 64, *a*. *Goodright v. Davids*, *Cowp.* 804. And where the proviso was, "that if the rent should be in arrear for twenty-one days after demand made, or if any of the covenants should be broken, then the term thereby granted, or so much thereof as should be then unexpired, should cease, determine, and be wholly void; and it should be lawful to and for the landlord upon the demised premises wholly to re-enter, and the same to hold for his own use, and to expel the lessee," it was held that the lease was voidable only, and not void; and that the landlord was bound to re-enter in case of forfeiture. *Arnsby v. Woodward*, 6 *B. and C.* 519. A. granted to B. a licence to enter upon his lands to search and dig for ores for a term of 21 years, with a pro-

viso, that if B. cease to work the mines for six months, or break any other of the covenants contained in the licence, then the "indenture, and the liberties, licences, powers, and authorities thereby granted, should cease, determine and be utterly void and of no effect." It was held, that the word "void" was to be construed to mean voidable, and that some act of A., to show his election to enforce the forfeiture, was necessary to put an end to the licence. *Roberts v. Davey*, 1 *Nev. and M.* 443, 4 *B. and Ad.* 664, *S. C.* Merely lying by and witnessing a forfeiture is not a waiver; *Doe v. Allen*, 3 *Taunt.* 78; but acceptance of rent accruing since the forfeiture, is a waiver; to constitute such waiver, the lessor must have notice of the forfeiture, which is a material and issuable fact. *Goodright v. Davids, Cowp.* 804. *Roe v. Harrison*, 2 *T. R.* 430, 431. *Pennant's case*, 3 *Rep.* 64, *b.* *Doe v. Brindley*, 1 *Nev. and M.* 1. So bringing an action of covenant for such rent is a waiver. *Roe v. Minshull, B. N. P.* 96; *see S. C. Selw. N. P.* 677. The lessor does not waive his right of re-entry by taking an insufficient distress for the rent, by the non-payment of which the lease became forfeited. *Brewer v. Eaton*, 3 *Dougl.* 231, *cited* 6 *T. R.* 220. And where a lease contained a clause of re-entry, in case the rent should be in arrear twenty-one days, and there should be no sufficient distress, Lord Ellenborough held that the landlord, having distrained within the twenty-one days, but continued in possession after, did not waive his right of re-entry. *Doe v. Johnson*, 1 *Stark.* 411. An agreement to allow the tenant time to repair is a suspension and not a waiver of the forfeiture. *Doe v. Brindley*, 1 *Nev. and M.* 1. If the breach be a continuing one, as the using rooms in a manner prohibited by the lease, the acceptance of rent after such user is not a waiver of the forfeiture incurred by the subsequent continuing user. *Doe v. Woodbridge*, 9 *B. and C.* 376.

Where a lease contained a general covenant to repair, and a covenant to repair upon three months' notice, Lord Ellenborough held that the landlord, by giving a notice "to repair forthwith," had not waived his right of re-entry for the breach of the general covenant. *Roe v. Paine*, 2 *Campb.* 520. But where a lease contained covenants to keep the premises in repair, and to repair within three months after notice, and a clause for re-entry for the breach of any covenant, and the premises being out of repair, the landlord gave a notice to repair within three months; it was held that this was a waiver of the forfeiture incurred by the breach of the general covenant to keep the premises in repair, and that the landlord could not bring ejectment until the expiration of the three months. *Doe d. Morecroft v. Meux*, 4 *B. and C.* 606. In *Roe v. Payne*, the language of the notice was very different, the tenant was required to put the premises in repair *forthwith*;

that did not prevent the landlord from bringing his ejectment at any time. *Per Bayley, J., ibid.* 609; *see Doe v. Miller*, 2 *C. and P.* 348.

In some cases the acts of the lessor may prevent the accruing of a forfeiture, as in the following case of an ejectment on forfeiture for breach of covenant, in a lease, wherein the lessee covenanted to insure in the joint names of himself and the lessor, and in two-thirds of the value of the premises demised. The lessee had insured in his own name only, and, as contended, to a less amount than two-thirds of the value of the premises. Both parts of the lease remained in the possession of the lessor, and an abstract only had been delivered by him to the lessee, which contained no mention that the insurance was to be in the joint names, though it stated that it was to be in two-thirds of the value of the premises. The lessor of the plaintiff had previously insured the premises at the same sum as the defendant. It was held that the conduct of the lessor being such as to induce a reasonable and cautious man to conclude that he was doing all that was necessary or required of him in insuring in his own name, and to the amount insured, he could not recover for a forfeiture, though there was no dispensation or release. *Doe v. Rowe, R. and M.* 343.

The tenant may prevent the forfeiture by tendering the rent. "The statute is beneficial to the tenant as well as the landlord. It relieves the latter from the necessity of making a demand with all the precision required at common law, and the tenant incurs no forfeiture until the declaration in ejectment is served upon him; and if at that time he is ready to pay the rent, although he did not tender it when it was due, it gives him the same benefit as if he had tendered it at that time." *Per Holroyd, J., Doe v. Shawcross*, 3 *B. and C.*, 756. *See Co. Litt.* 202, *a.*

By Heir-at-Law.

Where the lessor of the plaintiff claims as heir-at-law, he must prove that the ancestor from whom he claims was actually seised of the lands, &c.; or if he claim as heir to a remainderman, that the ancestor from whom he claims was the person in whom the remainder first vested by purchase. *Radcliffe's case*, 3 *Rep.* 42, *a. Walk. on desc.* 120. 2, That he is heir to such ancestor, and where he claims as heir to one in remainder, that the remainder has vested in possession.

Proof of seisin.] The seisin in fee may be proved by showing the ancestor in actual possession, or that he received rent from the person in possession, which is presumptive evidence of seisin in fee. *Co. Litt.* 15, *a. B. N. P.* 103. *Jayne v. Price*, 5 *Taunt.* 326, *ante, p.* 19. And it is not material that

the defendant does not claim under the persons who paid rent. *Doe v. Stacey*, 6 *C. and P.* 139. So proof of possession of the premises by the ancestor's lessee for years, is evidence of seisin, for the possession of tenant for years gives an actual seisin to the owner of the inheritance. *Co. Litt.* 243, *a*. *Bushby v. Dixon*, 3 *B. and C.* 298. So the possession of guardian in socage confers an actual seisin upon the infant. *Doe v. Newman*, 3 *Wils.* 516. Evidence of shooting and appointing a gamekeeper by the lord of a manor is not properly referable to a right of soil. *Per Bayley, J., Tyrwhitt v. Wynne*, 2 *B. and A.* 560. *See Doe v. Langton*, 2 *B. and Ad.* 695. The declarations of a deceased tenant that he held under a particular person are admissible to prove the seisin of that person. *Peaceable v. Watson*, 4 *Taunt.* 16. *Carne v. Nicoll*, 1 *Bingh. N. C.* 430.

Proof of descent.] The lessor of the plaintiff must prove that all the intermediate heirs between himself and the ancestor under whom he claims, are dead without issue. *Richards v. Richards*, 15 *East*, 294 (*n*). As to the presumption of the duration of life, *vide ante*, *p.* 22. If the lessor of the plaintiff claim as collateral heir, he must prove the descent of himself and the person last seised from a common ancestor, or at least from two brothers or sisters. *Doe v. Lord*, 2 *W. Bl.* 1100. Births, marriages, and deaths, may be proved by examined copies of entries in parish registers, and proof of the identity of the persons therein named, and of the parties in question. *Ante*, *pp.* 79, 140. The heralds' books, *ante*, *p.* 139, declarations of deceased members of the family, *ante*, *p.* 27, descriptions in family bibles, memorandums by members of the family, recitals in family deeds, monumental inscriptions, inscriptions on rings, old pedigrees hung up in family mansions, and the like, are admissible to prove a pedigree. *Ibid.* In proving a marriage it is not necessary in the first instance to give evidence of the regular publication of the bans, or of the regularity of the license, for the presumptive proofs of marriage have not been taken away by the marriage act. *Devereux v. Much Dew Church*, 1 *W. Bl.* 367. And since that statute, a marriage may be proved by reputation as well as before; *Reed v. Passer*, *Peake*, 233; or by the presumption arising from cohabitation. *B. N. P.* 114. Even where the parents are alive, reputation is sufficient evidence of the marriage, in ejectment by the son. *Doe v. Fleming*, 4 *Bingh.* 266. Either of the married parties, provided they be not interested, is competent to prove or disprove the marriage. *Goodright v. Moss*, *Cowp.* 593. As to Fleet marriages, *see ante*, *p.* 140.

The declarations of a relative are not evidence when the relative himself can be produced; *Pendrell v. Pendrell*, 2 *Str.* 925; and declarations made after a suit commenced, or a

controversy preparatory to one, cannot be admitted. *Berkeley peerage case*, 4 *Campb.* 401, *anté*, p. 28.

Certain alterations in the law of inheritance are introduced by statute 3 and 4 W. 4, c. 106. *See the Addenda.*

Defence.

Proof of Illegitimacy.] The defendant may prove the marriage *void* by a prior marriage, want of age, want of reason, or the non-observance of the solemnities required by the marriage act. 2 *Phill. Ev.* 235. The marriage of a minor by license, without the consent of the father, is good, the 4 Geo. 4, c. 75, s. 16, being directory only. *R. v. Inhab. of Birmingham*, 8 *B. and C.* 29. But by s. 22, if any persons shall knowingly and wilfully intermarry in any other place than a church, or such public chapel wherein bans may be lawfully published, unless by special license, or shall knowingly and wilfully intermarry without due publication of bans, or license from a person or persons having authority to grant the same, first had and obtained, or shall knowingly and wilfully consent to or acquiesce in the solemnisation of such marriage by any person not being in holy orders, the marriage of such persons shall be null and void. To render such a marriage void, it must be contracted with a knowledge by *both* parties that no due publication of bans has taken place. *R. v. Wroxton*, 4 *B. and Ad.* 640.

To prove the illegitimacy of a child, want of access, or any other circumstances which tend to show that the husband could not, in the course of nature, have been the father of his wife's child, are good evidence; *R. v. Luffe*, 8 *East*, 206; and presumptive evidence of non-access is admissible. *Goodright v. Saul*, 4 *T. R.* 356. Whenever a husband and wife are proved to have been together, at a time when, in the order of nature, the husband might have been the father of the child, if sexual intercourse did then take place, such sexual intercourse is *primâ facie* to be presumed, and it is incumbent on those who dispute the legitimacy of the child to disprove the fact of sexual intercourse having taken place, by evidence of circumstances which afford an irresistible presumption that it could not have taken place, and not by mere evidence of circumstances which may afford a balance of probabilities against the fact, that sexual intercourse did take place. *Per Sir J. Leach, M. R., Head v. Head*, 1 *Sim. and Stu.* 152, *S. C. affirmed*, 1 *Turner*, 139, *see the Banbury peerage case*, 1 *Sim. and Stu.* 153, *Morris v. Davies*, 3 *C. and P.* 218, 427. If a husband have access, and others at the same time are carrying on a criminal intercourse with his wife, a child born under such circumstances is legitimate. But if the husband and wife are living separately, and the wife is notoriously living in open adultery, although the husband have an opportunity of access, it would be monstrous to suppose that under

these circumstances he would avail himself of that opportunity. *Per Alderson, J., Cope v. Cope*, 5 *C. and P.* 608, 1 *Moo. and Rob.* 269, *S. C.* In case of a separation *à mensâ et thoro,* the children born during that period will be bastards, unless access be proved. *St. George and St. Margaret*, 1 *Salk.* 123. A wife will not be permitted to prove the non-access of her husband, but she is competent to prove the fact of her connexion with the person whom she charges as being the real father of her child. *R. v. Luffe*, 8 *East*, 203. In an action to try the legitimacy of a party born of a married woman, since dead, her declarations, that he was not the son of her husband, but of another man, are not admissible, nor are such declarations of the husband. *Cope v. Cope*, 1 *Moo. and Rob.* 296, 5 *C. and P.* 604, *S. C.*

By Devisee of Freehold Interest.

Where the lessor claims a freehold interest by devise, he must prove: 1, The seisin of the testator, *vide ante, p.* 431. 2, The regular execution of the will, *vide ante, p.* 91; and in case there are any estates limited by the will prior to the devise to himself, the determination of such estates. 3, The death of the testator.

Where the devisee of an estate refused to take it, saying she was entitled as heir-at-law, and would not accept any benefit by the will of the devisor, it was held that this was not such a disclaimer as prevented her from afterwards bringing ejectment, and relying on her title as devisee. *Doe v. Smyth*, 6 *B. and C.* 112. As to taking by descent or purchase see 3 and 4 W. 4, c. 106, s. 3. *See the Addenda.*

Defence.

The defendant may impeach the will, either by showing that it is a forgery, or by proving the incapacity of the testator to make a will. This incapacity may arise either from coverture or infancy; *Stat.* 34-35 *H.* 8, *c.* 5, *s.* 14; or from idiotcy, or non-sane memory. *Ibid. the Marquis of Winch. case*, 6 *Rep.* 23, *a.* So it may be shown that the will was made under duress, or obtained by fraud. *Doe v. Allen*, 8 *T. R.* 147.

Will void from idiotcy, or non-sane memory.] It is not enough that the testator, when he makes his will, should have sufficient memory to answer familiar and usual questions, but he ought to have a disposing memory, so as to be able to make a disposition of his lands with understanding and reason. *Marquis of Winch. case*, 6 *Rep.* 23, *a.* If the defendant succeed in proving that the testator has been affected by habitual derangement, then it is for the other party who claims under the will to show sanity and competency, at the period when the act was done. *Atty-Gen. v. Parnther*, 3 *Br. C. C.* 441. 1 *Phill.*

100. Where the evidence is conflicting, the safest course is to try the question by the evidence of collateral facts, as by correspondence, acts done with relation to property, and the circumstances attending the preparation and execution of the will itself. *Tatham v. Wright*, 2 *Russ. and Myl.* 21, 22.

Revocation of will by subsequent will.] The defendant may show the will revoked "by some other will or codicil in writing," according to the sixth section of the statute of frauds. Such second will, to operate as a revocation, must be executed according to the requisitions of the 5th section of the statute. *See ante, p.* 92. *Ecclestone v. Peake, Carth.* 80. If the second devise do not expressly revoke, it revokes only as far as it is clearly inconsistent with the former devise. *Harwood v. Goodright, Cowp.* 87. Where a devise in a will is clear, it is incumbent on those who contend that it is not to take effect by reason of a revocation in the codicil, to show that the intention to revoke is equally clear and free from doubt as the intention to devise. A. devised all that his copyhold messuage, &c. called Plomer Hill House, and together with, &c. to certain trustees and their heirs, upon trust for his wife, S. S. H., during her life or widowhood, or until she should cease to reside at the same premises, or let the same, or permit the same to be occupied by any other party than herself, she paying all taxes, &c. In the event of her death, second marriage, ceasing to reside, &c., he directed the trustees to be seised and possessed of those copyhold premises upon the same trusts as would best correspond with the uses declared concerning the residue of his real estates. The testator also devised to her certain money in the funds, and all his household goods, in trust for her during such time as, by virtue of his will, she should be entitled to his copyhold mansion and premises. The testator made five codicils to his will, in all of which his wife appeared to be the object of his peculiar bounty and regard. The fourth codicil was as follows: "I do make and add this fourth codicil to my will, *hereby revoking and making null and void several of the dispositions* heretofore made by me in my said will and codicil of all my freehold, copyhold, and personal estate and effects of all and every kind and description, and instead and in place of such devise, disposition, and bequest, I do give, devise, and bequeath all and every my freehold, copyhold, and personal estate and effects to my daughter, A. M. H.," with remainder over. It was held that the devise in this codicil was confined to the property which formed the testator's residue only, and that the copyhold estate to the wife for her life remained unrevoked. *Hearle v. Hicks*, 1 *Clark and F.* 20.

Revocation of will by other writing.] By the 6th section of the statute of frauds a will may be revoked "by some other will or codicil in writing, or other writing of the devisor, signed

in the presence of three or four witnesses, declaring the same." The statute does not require the witnesses to subscribe or attest the writing in the presence of the devisor, or indeed to subscribe it at all. *Townsend v. Pearce*, 8 *Vin. Ab. Devise*, p. 142. A codicil, whereby the testator confirms his will, does not give validity to an unattested alteration in a devise of lands, made after the execution of the will, nor to a testamentary paper, purporting to be a devise of lands, unattested and unannexed to the will, and not referred to by such codicil. *Utterton v. Robins*, 2 *Nev. and M.* 819, 1 *Ad. and Ell.* 423, *S. C.*

Revocation of will by cancelling, &c.] By the same section of the statute a will may be revoked "by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence, and by his directions and consent." The act must be done with an intention of revoking, and though the burning or tearing be partial or incomplete, yet if done with an intention to revoke, it will operate as a revocation. *Bibb v. Thomas*, 2 *W. Bl.* 1043. *Winsor v. Pratt*, 2 *B. and B.* 650. It is a question of fact for the jury, whether the testator had completed the intended act of revocation. *Doe v. Perks*, *Gow*, 193. The declarations of the testator at the time of doing the act, and his subsequent declarations respecting it, are admissible. *Burtenshaw v. Gilbert*, *Cowp.* 53. 2 *East*, 534 (*b*).

Implied revocations.] The subsequent marriage of the testator, and the birth of a child, without provision made for them, operate as an implied revocation. *Doe v. Lancashire*, 5 *T. R.* 58. It seems doubtful whether parol evidence is admissible to rebut an implied revocation. In *Lugg v. Lugg*, 1 *Ld. Raym.* 441, it is said, that if by any expression, or any other means, it had appeared that it was the testator's intention that his will should continue in force, the marriage and birth of issue would not have been a revocation. So in *Brady v. Cubit*, 1 *Dougl.* 31, such evidence was considered admissible by three of the judges; and it is the practice of the ecclesiastical courts to receive it. *Emmerson v. Boville*, 1 *Phill.* 342. *Holloway v. Clarke*, *Id.* 339. *Johnson v. Johnson*, *Id.* 468. *See also Goodtitle v. Otway*, 2 *H. Bl.* 522. But on the other hand Lord Alvanley expressed doubts as to the admissibility of such evidence; *Gibbons v. Caunt*, 4 *Ves.* 848; which were likewise entertained by the Lord Chancellor in *Kenebel v. Scrafton*, 5 *Ves.* 663, 2 *East*, 538, *S. C.* *See also Doe v. Lancashire*, 5 *T. R.* 60.

By Devisee of Leasehold Interest.

A devisee of leasehold interest must prove: 1, The execution of the lease by the lessor, or if the testator was an assignee, the execution of the lease and the assignment to

him; 2, The probate of the will; and, 3, The assent of the executor to the bequest. By the assent the term is vested in the devisee from the death of the testator. *Saunder's case*, 5 *Rep.* 12, *b. Doe v. Guy*, 3 *East*, 120. A very small matter shall amount to an assent, it being a rightful act. *Noel v. Robinson*, 1 *Vern.* 94. *Doe v. Mabberley*, 6 *C. and P.* 126.

By Devisee of Copyhold.

A devisee of copyhold premises must prove: 1, The admittance of the testator: 2, The will, and in cases not within stat. 55 Geo. 3, c. 192, which dispenses with such surrender, a surrender to the use of the will: 3, His own admittance. *Roe v. Hicks*, 2 *Wils.* 15. A will to pass copyholds, which have been surrendered to the uses of the will, need not be signed with the same solemnities as a devise of freehold lands; a draft of, or instructions for a will, have been held sufficient to direct the uses of a surrender. *Carey v. Askew*, 2 *Br. C. C.* 319. *Doe v. Danvers*, 7 *East*, 299, 324.

Proof of Admittance.] Although in ejectment against a stranger, the *heir* of the copyholder, *Doe v. Hellier*, 5 *T. R.* 169, *Roe v. Hicks*, 2 *Wils.* 13, or the grantee of the reversion of a copyhold from the lord, *Doe v. Loveless*, 2 *B. and A.* 453, need not prove an admittance, yet a devisee, being a purchaser, must prove his admittance. The admittance of tenant for life being the admittance of him in remainder, *Auncelme v. Auncelme*, *Cro. Jac.* 31, a devisee in remainder has only to prove the admittance of the tenant for life, and not his own admittance. The title of a surrenderee is not complete before admittance, which he must prove; but after admittance, his title has relation to the time of surrender, against all persons but the lord; and he may therefore recover in ejectment upon a demise laid between the time of the surrender and admittance, provided the admittance be before the trial. *Holdfast v. Clapham*, 1 *T. R.* 600. *Doe v. Hall*, 16 *East*, 208. A person to whom an original grant of a copyhold is made is tenant before admittance. *Doe v. Whitaker*, 5 *B. and Ad.* 409, 3 *Nev. and M.* 225, *S. C.* An heir may, before admittance, devise copyholds descending to him. *King v. Turner*, 1 *Mylne and K.* 456. The lord may admit to a copyhold out of the manor, and it makes no distinction that the admittance was at a void court. But a steward cannot, in his mere character of steward, admit out of the manor, though he may be specially authorised so to do. Where an admittance was entered at a void court, yet as the proceedings of that court were entered by the steward on the court rolls, and as, therefore, at the following court the tenants would have information of it, it was held sufficient. *Doe v. Whitaker*, 5 *B. and Ad.* 409, 3 *Nev. and M.* 225, *S. C.* The surrender and admittance may be proved

by the original entries on the court-rolls of the manor, or by copies of the court-rolls of the admittance and surrender properly stamped; *Doe v. Hall*, 16 *East*, 231; with evidence of the identity of the parties admitted. *Doe v. Smith*, 1 *Campb.* 197; *and see Doe v. Callaway*, 6 *B. and C.* 484, *ante, p.* 76.

By Mortgagee.

If the action be brought against the mortgagor in possession, the mortgagee has only to prove the execution of the mortgage-deed, and a demand of possession is unnecessary; *Doe v. Maisey*, 8 *B. and C.* 767; *Doe v. Giles*, 5 *Bingh.* 420, but if a third person is in possession, the plaintiff must show a title to oust him. Thus if he be a tenant from year to year, who came in *prior* to the mortgage, the lessor of the plaintiff must prove the tenancy, and a regular notice to quit; *Thunder v. Belcher*, 3 *East*, 449; but if the tenant came in subsequently to the mortgage, and has not been acknowledged as tenant by the mortgagee, it will be sufficient to show that his interest was created subsequently to the title of the lessor of the plaintiff, without proving any notice to quit. *Keech v. Hall*, 1 *Dougl.* 21.

By Tenant by Elegit.

Tenant by elegit must prove the judgment, the elegit taken out upon it, and the inquisition and return thereupon; and for this purpose an examined copy of the judgment roll, containing the award of elegit, and the return of the inquisition, is sufficient, without proving a copy of the elegit and of the inquisition. *Ramsbottom v. Buckhurst*, 2 *Maule and S.* 565. If the sheriff's return do not state that he has set out a moiety *by metes and bounds*, it is bad, and the objection may be taken at the trial. *Fenny v. Durrant*, 1 *B. and A.* 40. If a third person be in possession, the lessor of the plaintiff must prove not only his own title, but also that of the debtor under whom he claims. 2 *Phill. Ev.* 252. But it is sufficient to prove a *primâ facie* title in the debtor; and it lies upon the tenants in possession to show that their title is anterior to the judgment. *Doe v. Owen*, 2 *Crom. and J.* 71. In ejectment for lands, the lease of which had been taken in execution under a *fi. fa.* against the termor, it was held that the lessor of the plaintiff, who was plaintiff in the former action, and to whom the sheriff had assigned the lease, was bound not only to prove the *fi. fa.* but also the judgment. *Doe v. Smith, Holt*, 589, 2 *Stark.* 199, *S. C.* But where the lessor of the plaintiff was not the plaintiff in the first action, it was held sufficient for him, in ejectment against the defendant in the first action, to produce the *fi. fa.* without proving the judgment. *Doe v. Murless*, 6 *Maule and S.* 110.

By Conusee of Statute Merchant or Staple.

In ejectment by the conusee of a statute merchant against the conusor, the lessor of the plaintiff must prove the obligation of the conusor; or in case the obligation has been lost or damaged, a true copy from the roll in the custody of the clerk of recognizances, or his deputy, made and signed by him or his deputy, and duly proved; and in the next place the writ of extent. An examined copy of the writ of *capias si laicus* does not appear to be necessary, as it is recited in the writ of extent. If a third person, and not the conusor, be in possession, in addition to these proofs evidence must be given of the conusor's title. 2 *Phill. Ev.* 253.

In ejectment by the conusee of a statute staple, he must produce and prove: 1, The bond of the conusor, or in case of its loss or damage, a true copy from the roll in the custody of the clerk of recognizances, or his deputy, made and signed by him or his deputy, and duly proved: 2, The writ of *liberate;* but proof of the writ of extent appears not to be necessary, as it is recited in the *liberate.* If a third person be in possession, proof of the conusor's title will also be required. 2 *Phill. Ev.* 254.

By Guardian.

In ejectment by guardian in socage the lessor of the plaintiff must prove the seisin of the ancestor of the heir, that he has left an heir-at-law who is under the age of fourteen, and that among the relations to whom the inheritance cannot descend, he himself is the next of blood to such heir. It seems necessary to prove that the heir was under the age of fourteen at the time of the demise laid in the declaration. 2 *Phill. Ev.* 250. *Doe v. Bell,* 5 *T. R.* 471. In ejectment by a guardian appointed by deed or will, according to 12 Car. 2, c. 24, s. 8, 9, the title of the deceased father must be proved, the minority of the ward at the time of the demise laid in the declaration, and the due execution of the will or deed. 2 *Phill. Ev.* 251.

By Executor or Administrator.

In ejectment by an administrator, the lessor of the plaintiff must prove: 1, The lease to his intestate; and, 2, The intestate's death and the letters of administration, or a copy of the entry in the book of acts; *Davis v. Williams,* 13 *East,* 232, *B. N. P.* 246, *ante, p.* 77; or the certificate of administration granted by the ecclesiastical court. *Kempton v. Cross, Rep. temp. Hardw.* 108. Administration when granted relates back to the intestate's death. *Com. Dig. Administration, (B.* 10*)*; *vide* 3 *and* 4 *W.* 4, *c.* 27, *s.* 6, *post, p.* 444. And the lessor of the plaintiff may therefore recover on a demise laid be-

tween the time of the intestate's death and the grant of administration.

An executor must prove the lease to his testator, and produce the probate. The term is vested in the executor from the death of the testator, and the executor may therefore recover on a demise laid between the time of the testator's death and of the probate. *Com. Dig. Administration*, (*B.* 10.)

By Parson.

In ejectment by a parson for the recovery of the parsonage-house, glebe, or tithes, he must show his title by proving his presentation, institution, and induction, which is sufficient without proof of title in the patron. *Heath v. Pryn*, 1 *Vent.* 14. *B. N. P.* 105. If the presentation was by parol, it may be proved by a person who was present and heard it. *R. v. Eriswell*, 3 *T. R.* 723, 2 *Phill. Ev.* 256. But a presentation by a corporation must be in writing under the common seal. *Gib. Codex*, 794. The institution may be proved by the letters testimonial of institution, or by the official entry in the public registry of the diocese, which ought regularly to record the time of the institution, and on whose presentation; *ibid.* 813; in which case it would seem to be evidence of the presentation as well as of the institution. 2 *Phill. Ev.* 257. So the letters of institution of a party, reciting the cession of his predecessor, followed by induction, are sufficient evidence of the cession. *Doe v. Carter*, *R. and M.* 238. The induction may be proved, either by some person who was present at the ceremony, or by the indorsement on the mandate directed by the ordinary to the archdeacon, or by the return to the mandate, if a return has been made. 2 *Phill. Ev.* 257. *Chapman v. Beard*, 3 *Anst.* 942. The lessor of the plaintiff will not be required to prove that he has taken the requisite oaths, or declared his assent to the book of common prayer, according to the act of uniformity. *Powell v. Millbank*, 2 *W. Bl.* 851, 3 *East*, 199. Some evidence must be given that the property to be recovered is church property, as that the premises were occupied by a former incumbent, &c. 2 *Phill. Ev.* 258.

Amendment.] After the cause has been called on it is too late to amend the record by increasing the term: the plaintiff must withdraw the record. *Doe v. Hay*, 1 *Moo. and Rob.* 242.

Competency of Witnesses.

The tenant in possession is not a competent witness to support his landlord's title; *Doe v. Williams*, *Cowp.* 621; and where the lessor of the plaintiff has proved a *primâ facie* possession in the defendant, a third person will not be allowed to prove that he is himself tenant in possession. *Doe v. Wilde*,

5 *Taunt.* 183. *Doe v. Bingham,* 4 *B. and A.* 672. Where both parties claim as lessees under the person who is produced as a witness, and the question is, whether he demised first to the lessor of the plaintiff or to the defendant, if the leases were granted without reservation of rent, he will, as it seems, be a competent witness; but if the contending parties are to pay rent in different rights, he will not be allowed to prove either lease. *Fox v. Swann, Styles,* 482. *Bell v. Harwood,* 3 *T. R.* 310. An heir apparent is a good witness in ejectment for the land, but not so a remainderman, for he has a present interest in the land. *Smith v. Blackham,* 1 *Salk.* 483. *Doe v. Tyler,* 6 *Bingh.* 390. The mother of a defendant in ejectment, who claims to retain possession of premises as heir-at-law to his father, is a competent witness for the defendant, although the effect of her testimony be to prove a seisin in law in her husband, which would give her a claim to dower. *Doe v. Maisey,* 1 *B. and Ad.* 439. An executor who takes a pecuniary interest under a will is competent to support it, for the verdict will only have the effect of establishing the will as to the real property. *Doe v. Teage,* 5 *B. and C.* 335. So a grantee who is a bare trustee is competent to prove the execution of a deed to himself. *Goss v. Tracey,* 1 *P. Wms.* 287, 293; *cited supra.* Where a witness on the *voir dire* stated that the lessor of the plaintiff had formerly assigned to him the premises in question for a particular purpose, but that he had given up the deed to the lessor of the plaintiff, and had never had possession, he was held incompetent. *Doe v. Bragg, R. and M.* 87.

Defence.

The defendant, by way of defence, may show the title in himself or a third person, or that the lessor of the plaintiff has no right of entry. Thus, he may prove the creation and existence of an outstanding term, though vested in a trustee for the lessor of the plaintiff, unless the circumstances are such that a surrender can be presumed; *vide supra.* The defence of a descent cast, discontinuance, or warranty is taken away by the stat. 3 and 4 W. 4, c. 27, s. 29. *Vide post.*

Where a party defends an ejectment as landlord, and the occupiers of the premises have suffered judgment by default, he cannot object that the occupiers have not received notice to quit from the lessors of the plaintiff. *Doe v. Creed,* 5 *Bingh.* 327.

Action barred by the Statute of Limitations.] The period of limitation in the action of ejectment was formerly governed by the 21 Jac. 1, c. 16, but now by the 3 and 4 W. 4, c. 27, which specifies in detail the various periods at which, in different

cases, the statute shall begin to operate, and the manner in which, by the acknowledgment of the party, its operation may be prevented. The first section is an interpretation clause.

Meaning of the Words in the Act, Sec. 1.] "That the words and expressions herein-after mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows; (that is to say,) the word "Land" shall extend to manors, messuages, and all other corporeal hereditaments whatsoever, and also to tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole), and also to any share, estate, or interest in them, or any of them, whether the same shall be a freehold or chattel interest, and whether freehold or copyhold, or held according to any other tenure; and the word "Rent" shall extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole); and the person through whom another person is said to claim shall mean any person by, through, or under, or by the act of whom, the person so claiming became entitled to the estate or interest claimed, as heir, issue in tail, tenant by the curtesy of England, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee, or otherwise, and also any person who was entitled to an estate or interest to which the person so claiming, or some person through whom he claims, became entitled as lord by escheat; and the word "Person" shall extend to a body politic, corporate, or collegiate, and to a class of creditors, or other persons, as well as an individual; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male."

No Land or Rent to be recovered but within 20 years after the Right of Action accrued to the Claimant or some Person whose Estate he claims, Sec. 2.] "That after the thirty-first day of December one thousand eight hundred and thirty-three no person shall make an entry or distress or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within

twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to the person making or bringing the same."

When the Right shall be deemed to have accrued, Sec. 3.] "That in the construction of this act the right to make an entry or distress or bring an action to recover any land or rent shall be deemed to have first accrued at such time as herein-after is mentioned; (that is to say,) when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received; and when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death; and when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed, or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument; and when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession; and when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken."

Where Advantage of Forfeiture is not taken by Remainder-

man, he shall have a new Right when his Estate comes into Possession, Sec. 4.] "Provided always, that when any right to make an entry or distress or to bring an action to recover any land or rent by reason of any forfeiture or breach of condition shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued in respect of such estate or interest at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened."

Reversioner to have a new Right, Sec. 5.] "Provided also, that a right to make an entry or distress or to bring an action to recover any land or rent shall be deemed to have first accrued, in respect of an estate or interest in reversion, at the time at which the same shall have become an estate or interest in possession by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land, or some person through whom he claims, shall, at any time previously to the creation of the estate or estates which shall have determined, have been in possession or receipt of the profits of such land, or in receipt of such rent."

An Administrator to claim as if he obtained the Estate without Interval after Death of Deceased, Sec. 6.] "That for the purposes of this act an administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration."

In the Case of a Tenant at Will, the Right shall be deemed to have accrued at the end of one Year, Sec. 7.] "That when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: Provided always, that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee."

No Person, after a Tenancy from Year to Year, to have any Right but from the end of the first Year or last Payment of Rent, Sec. 8.] "That when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or to bring an action to recover such land or rent, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen)."

Where Rent amounting to 20s., reserved by a Lease in Writing, shall have been wrongfully received, no Right to accrue on the Determination of the Lease, Sec. 9.] "That when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, by virtue of a lease in writing, by which a rent amounting to the yearly sum of twenty shillings or upwards shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent, subject to such lease, or of the person through whom he claims, to make an entry or distress or to bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled."

A mere Entry not to be deemed Possession, Sec. 10.] "That no person shall be deemed to have been in possession of any land within the meaning of this act merely by reason of having made an entry thereon."

No Right to be preserved by continual Claim, Sec. 11.] "That no continual or other claim upon or near any land shall preserve any right of making an entry or distress or of bringing an action."

Possession of one Coparcener, &c. not to be the Possession of the others, Sec. 12.] "That when any one or more of several persons entitled to any land or rent as coparceners, joint tenants, or tenants in common, shall have been in possession

or receipt of the entirety, or more than his or their undivided share or shares of such land or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them."

Possession of a younger Brother not to be the Possession of the Heir, Sec. 13.] "That when a younger brother or other relation of the person entitled as heir to the possession or receipt of the profits of any land, or to the receipt of any rent, shall enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir."

Acknowledgment in writing given to the Person entitled, or his Agent, to be equivalent to Possession or Receipt of Rent, Sec. 14.] "Provided always, that when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent in writing signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given shall be deemed, according to the meaning of this act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments if more than one, was given."

Where Possession is not adverse at the Time of passing the Act, the Right shall not be barred until the End of Five Years afterwards, Sec. 15.] "Provided also, that when no such acknowledgment as aforesaid shall have been given before the passing of this act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing of this act have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years herein before limited shall have expired, make an entry or distress or bring an action to recover such land or interest at any time within five years next after the passing of this act."

Persons under Disability of Infancy, Lunacy, Coverture, or beyond Seas, and their Representatives, to be allowed Ten Years from the Termination of their Disability or Death, Sec. 16.] "Provided always, that if at the time at which the right of any person to make an entry or distress or bring an action to recover any land or rent shall have first accrued as aforesaid such person shall have been under any of the disabilities herein-after mentioned, (that is to say,) infancy, coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas, then such person, or the person claiming through him, may, notwithstanding tho period of twenty years herein-before limited shall have expired, make an entry or distress or bring an action to recover such land or rent at any time within ten years next after the time at which the person to whom such right shall first havo accrued as aforesaid shall have ceased to be under any such disability, or shall have died (which shall have first happened)."

But no Action, &c. shall be brought beyond Forty years after the right of Action accrued, Sec. 17.] "Provided nevertheless, that no entry, distress, or action shall be made or brought by any person who at the time at which his right to make an entry or distress or to bring an action to recover any land or rent shall have first accrued, shall be under any of the disabilities herein-before mentioned, or by any person claiming through him, but within forty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such forty years, or although the term of ten years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired."

No further time to be allowed for a succession of Disabilities, Sec. 18.] "Provided always, that when any person shall be under any of the disabilities herein-before mentioned at the time at which his right to make an entry or distress or to bring an action to recover any land or rent shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress or to bring an action to recover such land or rent beyond the said period of twenty years next after the right of such person to make an entry or distress or to bring an action to recover such land or rent shall have first accrued, or the said period of ten years next after the time at which such person shall have died, shall be allowed by reason of any disability of any other person."

Scotland, Ireland, and the adjacent Islands, not to be deemed

beyond Seas, Sec. 19.] "That no part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, or Sark, nor any island adjacent to any of them (being part of the dominions of his Majesty), shall be deemed to be beyond seas within the meaning of this act."

When the Right to an Estate in Possession is barred, the Right of the same Person to future Estates shall also be barred, Sec. 20.] "That when the right of any person to make an entry or distress or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession shall have been barred by the determination of the period herein-before limited, which shall be applicable in such case, and such person shall at any time during the said period have been entitled to any other estate, interest, right, or possibility, in reversion, remainder, or otherwise, in or to the same land or rent, no entry, distress, or action shall be made or brought by such person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right, or possibility, unless in the mean time such land or rent shall have been recovered by some person entitled to an estate, interest, or right which shall have been limited or taken effect after or in defeasance of such estate or interest in possession."

When Tenant in Tail is barred, Remaindermen, whom he might have barred, shall not recover, Sec. 21.] "That when the right of a tenant in tail of any land or rent to make an entry or distress or to bring an action to recover the same shall have been barred by reason of the same not having been made or brought within the period herein before limited, which shall be applicable in such case, no such entry, distress, or action shall be made or brought by any person claiming any estate, interest, or right which such tenant in tail might lawfully have barred."

Possession adverse to a Tenant in Tail shall run on against the Remaindermen whom he might have barred, Sec. 22.] "That when a tenant in tail of any land or rent, entitled to recover the same, shall have died before the expiration of the period herein before limited, which shall be applicable in such case, for making an entry or distress or bringing an action to recover such land or rent, no person claiming any estate, interest, or right which such tenant in tail might lawfully have barred shall make an entry or distress or bring an action to recover such land or rent but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress or brought such action."

Where there shall have been Possession, under an Assurance

by a Tenant in Tail, which shall not bar the Remainders, they shall be barred at the end of Twenty Years after the time when the Assurance, if then executed, would have barred them, Sec. 23.] "That when a tenant in tail of any land or rent shall have made an assurance thereof, which shall not operate to bar an estate or estates to take effect after or in defeasance of his estate tail, and any person shall by virtue of such assurance, at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person, or any other person whatsoever (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail), shall continue or be in such possession or receipt for the period of twenty years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then at the expiration of such period of twenty years such assurance shall be and be deemed to have been effectual as against any person claiming any estate, interest, or right to take effect after or in defeasance of such estate tail."

No Lands or Rents to be recovered by Ecclesiastical or Eleemosynary Corporation sole but within two Incumbencies and six Years, or sixty Years, Sec. 29.] "Provided always, that it shall be lawful for any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other spiritual or eleemosynary corporation sole, to make an entry or distress or to bring an action or suit to recover any land or rent within such period as herein-after is mentioned next after the time at which the right of such corporation sole, or of his predecessor, to make such entry or distress or bring such action or suit shall first have accrued; (that is to say,) the period during which two persons in succession shall have held the office or benefice in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbencies and such term of six years taken together shall amount to the full period of sixty years; and if such times taken together shall not amount to the full period of sixty years, then during such further number of years in addition to such six years as will with the time of the holding of such two persons and such six years make up the full period of sixty years; and after the said thirty-first day of December, 1833, no such entry, distress, action, or suit shall be made or brought at any time beyond the determination of such period."

At the End of the Period of Limitation the Right of the Party out of Possession to be extinguished, Sec. 34.] "That at the determination of the period limited by this act to any person for making an entry or distress, or bringing any writ of *quare impedit* or other action or suit, the right and title of such person to the land, rent, or advowson for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished."

Receipt of Rent to be deemed Receipt of Profits, Sec. 35.] "That the receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of this act."

Sec. 36.] Real and mixed actions abolished after the 31st December, 1834; except for dower, *quare impedit,* and ejectment.

No Descent, Warranty, &c. to bar a Right of Entry, sec. 39.] That no descent cast, discontinuance, or warranty which may happen or be made after the 31st December, 1833, shall toll or defeat any right of entry, or action for the recovery of land."

In order to render the statute of limitations a bar in ejectment, the defendant must prove an adverse possession for twenty years. There is no adverse possession in the following cases: 1, Where the possession of the party in possession is the possession of the lessor of the plaintiff, as formerly where a younger son entered by abatement on the death of his father, and died seised, this possession was not adverse to the title of his elder brother. *Co. Litt.* 243, *a.* So the possession of one coparcener, jointenant, or tenant in common, was not adverse to the title of his co-tenant; *Ford v. Grey,* 6 *Mod.* 44; *see Doe v. Halse,* 3 *B. and C.* 757; unless there has been an actual ouster, *vide ante.* But the law is now altered in both these instances by the above statute. *Sections* 12 *and* 13. 2, There is no adverse possession where the estate of the party in possession, and that of the lessor of the plaintiff, form parts of one and the same estate. Thus the possession of the particular tenant is never adverse to the title of him in remainder or reversion. *Taylor v. Horde,* 1 *Burr.* 60. *Fishar v. Prosser, Cowp.* 218. *See also Doe v. Brightwen,* 10 *East,* 583. Where the relation of landlord and tenant can be implied, the statute will not run; *Roe v. Ferrars,* 2 *B. and P.* 542; nor where the party in possession is tenant at sufferance. *Doe v. Hull,* 2

D. and R. 38. 3, There is no adverse possession where the relation of trustee and *cestui que trust* subsists between the parties. *Keene v. Deardon*, 8 *East*, 248. A wrongful *continuance* in possession for twenty years by a person who comes in lawfully, is a bar in ejectment. *Doe v. Gregory*, 4 *Nev. and M.* 308.

Where interest has been paid upon a mortgage, it has been held to prevent the statute from running against the mortgagee, though he had been out of possession for more than twenty years, for the payment of interest is conclusive evidence of a continuing tenancy between the mortgagor and mortgagee. *Hatcher v. Fineux*, 1 *Ld. Raym.* 740. *Hall v. Doe*, 5 *B. and A.* 690.

If a cottage be built on the lord's waste in defiance of him, twenty years undisturbed possession of such cottage will be a bar to the lord; but if built at first with the lord's permission, or if any acknowledgment have been since made, the statute will not run. Thus where the defendant had inclosed a small piece of waste land by the side of a highway, and had occupied it for thirty years without paying any rent, but at the expiration of that time, the owner of the adjoining land demanded 6*d*. rent, which the defendant paid on three several occasions, it was held that these payments, in the absence of other evidence, were conclusive to show that the defendant's occupation began by permission, and that the owner of the adjoining land was entitled to recover. *Doe v. Wilkinson*, 3 *B. and C.* 413. In a similar case, after a possession of upwards of twenty years, the lord demanded and obtained possession, which was reluctantly given; and the occupier was told, that if he resumed possession, it would only be during pleasure. He did resume possession, and remained in it for fifteen years more; and though he never paid any rent, it was held that this was not necessarily an adverse possession, but might be presumed to have commenced with the lord's permission. *Doe v. Clark*, 8 *B. and C.* 717. It appears not to be decided whether twenty years' possession of premises, which a tenant has gained by encroachment on the lord's waste, will be a bar in an ejectment brought for such premises, *by his lessor*, after the expiration of the tenancy. Perryn, B., and Heath and Buller, justices, are said to have ruled that the lessor was entitled to recover; *see Doe v. Davies*, 1 *Esp.* 461; and Graham, B., ruled the same way; *Bryan v. Winwood*, 1 *Taunt.* 208; as did Parke, B., in *Doe v. Rees*, 6 *C. and P.* 610; while Lord Kenyon has laid it down as clear law, that if a tenant inclose part of a waste, and is in possession thereof so long as to acquire a possessory right to it, such inclosure does not belong to the landlord; but if the tenant has acknowledged that he held such inclosed part of his landlord, this

would make a difference. *Doe v. Mulliner*, 1 *Esp.* 460. Thompson, B., also inclined to the same opinion, but refused to nonsuit the landlord, out of deference to the authorities cited for the plaintiff. *Doe v. Davies*, 1 *Esp.* 461 ; *and see Attorney Gen. v. Fullerton*, 2 *Ves. and Beames*, 263. It is difficult to say how far the 7th section of the 3 and 4 W. 4. c. 27, *ante p.* 444, affects the above decisions.

When the statute has once begun to run, no subsequent disability will stop its operation. Under the 21 Jac. 1. it was held that the saving clause only extended to the persons to whom the right *first* descended. *Doe v. Jones*, 4 *T. R.* 310. It was held in *Doe v. Jesson*, 6 *East*, 80, that the word *death* in the saving clause of the statute referred to the death of the person to whom the right first accrued, and who died under disability, and that the heir, though under disability, must enter within ten years from that time, but in a later case the court of C.P. were of opinion that the heir has ten years, after his own disability ceases ; *Cotterell v. Dutton*, 4 *Taunt.* 826 ; which is said to be the construction invariably adopted in practice. *Sugd. V. and P.* 334. The 16th and 17th sections of the 3 and 4 W. 4, c. 27, *ante, p.* 447, have put an end to these doubts. If an estate descends to parceners, one of whom is under a disability, which continues more than twenty years, and the other does not enter within twenty years, the disability of the one does not preserve the title of the other, after the twenty years elapsed. *Doe v. Rowlston*, 2 *Taunt.* 441.

The following case has occurred upon the construction of the 3 and 4 W. 4, c. 27. A. devised to B. his wife, in fee, and died. B. in 1772 entered and married C. A few years afterwards B. and C. quitted possession and removed to another county. B. and C. died in 1828 and 1832, leaving a son D. In ejectment by D. in 1835, it was held that the action was barred. *Doe v. Brandson*, 4 *Nev. and M.* 664.

REPLEVIN.

The evidence in the action of replevin varies according to the nature of the issue joined.

In some cases the defendant is allowed by statute to plead not guilty, or, in a general form, that the matter complained of was done under the authority of an act of parliament, and to give the special matter in evidence under such plea ; as by 43 Eliz. c. 2, s. 19, in the case of poor rates, and by 23 Hen. 8, c. 5, s, 11, in the case of sewers' rates. 1 *Saund.* 347, *c (n).*

Evidence on non cepit.] The place in which goods are alleged in the declaration to have been taken is material and traversable. *Weston v. Carter*, 1 *Sid.* 10. And the plea of *non cepit*, that the defendant did not take the cattle, &c. is termed the general issue in replevin. It lies upon the plaintiff to prove this issue, and if found for the defendant it merely excuses him from damages, but does not entitle him to a return. It is sufficient for the plaintiff upon this issue to show that the defendant had the goods in his possession in the place in which, &c., for the wrongful taking is continued in every place in which he afterwards detains them. *Walton v. Kersop*, 2 *Wils.* 354. If in fact the defendant neither took the cattle in the place named, nor had them there afterwards, he should plead *cepit in alio loco*, and entitle himself to a return, by adding an avowry or cognizance, which in that case is not traversable. *Anon.* 1 *Vent.* 127, *B. N. P.* 54.

Avowry.] The defendant usually avows or makes cognizance, in order to obtain a return of the goods, to which avowry or cognizance the plaintiff pleads in bar. The proofs under the most usual pleas in bar will be stated.

Where the distress has been for rent, it is enacted by 17 Car. 2, c. 7, s. 2, that in case the plaintiff shall be nonsuited after cognizance, or avowry made, and issue joined, or if a verdict shall be given against the plaintiff, then the jurors who were impanelled or returned to inquire of such issue, shall at the prayer of the defendant inquire *concerning the sum of the arrears, and the value of the goods or cattle distrained;* and thereupon the avowant, or he that makes cognizance, shall have judgment for such arrearages, or so much thereof as the goods or cattle distrained amount unto, &c. The avowant, therefore, must be prepared to prove both the amount of the rent in arrear and the value of the goods or cattle taken, and the omission of this inquiry cannot be supplied by a writ of inquiry; *Sheape v. Culpepper*, 1 *Lev.* 255, 1 *Saund.* 195, *b* (*n*); though the defendant may have the common law judgment for a return. *Rees v. Morgan*, 3 *T. R.* 349.

If the defendant avows for rent, and that the goods were fraudulently removed, &c. under 11 Geo. 2, and the plaintiff pleads in bar no fraudulent removal, the defendant must show that there was no sufficient distress on the premises. *Parrey v. Duncan*, *M. and M.* 533.

Evidence on plea of non demisit or non tenuit.] To an avowry for rent arrear, the plaintiff usually pleads *non demisit* or *non tenuit*, upon which issue the defendant must prove the demise, as stated in his avowry. He must prove a *demise*, and therefore if he only shows an agreement for a lease, it is insufficient.

Dunk v. Hunter, 5 *B. and A.* 322. But though the plaintiff enters upon the land under an agreement for a lease, in which the amount of the rent is not stated, yet if he occupies and pays rent, he becomes tenant from year to year at that rent, and an avowry, stating the terms of the tenancy accordingly, will be sufficient. *Knight v. Bennett*, 3 *Bingh.* 361. So if, entering under such an agreement, he acknowledges half a year's rent to be due. *Cox v. Bent*, 5 *Bingh.* 185, *supra ; and see Saunders v. Musgrove*, 6 *B. and C.* 524. But unless a person entering under an agreement for a lease pays the rent or promises to pay a rent certain, or to settle a rent certain in account, no demise at a rent certain can be implied, so as to entitle the landlord to distrain. *Regnart v. Porter*, 7 *Bingh.* 451. So a tenant holding over, after notice to quit given by the landlord, but not paying rent, is not liable to a distress, the mere holding over not making him tenant upon the old terms. *Jenner v. Clegg*, 1 *Moo. and Rob.* 213. The terms of the tenancy must be proved as laid, and therefore if the rent reserved was higher than the rent stated, it is a fatal variance, for the contract must be truly stated. *Brown v. Sayce*, 4 *Taunt.* 320. But where the defendant avowed for taking growing corn in four closes, and stated that the plaintiff held the closes in which, &c., at a certain yearly rent, and it appeared that he also held two other closes at that rent, this was decided to be no variance, for every part of the land was liable to the whole rent. *Hargrave v. Seewin*, 6 *B. and C.* 34, 9 *D. and R.* 23, *S. C.; and see Page v. Chuck*, 10 *B. Moore*, 264, *Philpott v. Dobinson*, 6 *Bingh.* 104. If the defendant avows for rent, payable at *Martinmas*, this means *New* Martinmas, and if it appears that it is in fact payable at *Old* Martinmas it is a variance. *Smith v. Walton*, 8 *Bingh.* 235. Where the rent was reserved, payable quarterly or half-quarterly, if required, and the landlord received the rent quarterly for twelve months, it was held that he could not, without notice, distrain for a half-quarter. *Mallam v. Arden*, 10 *Bingh.* 299, 3 *Moore and S.* 793, *S. C.* The defendant cannot, under an avowry for double rent, under the statute 11 Geo. 2, c. 19, s. 18, recover the single rent. *Johnstone v. Huddlestone*, 4 *B. and C.* 938.

As the plea of *nil habuit in tenementis* is a bad plea to an avowry for rent arrear, *Syllivan v. Stradling*, 2 *Wils.* 208, the plaintiff is not allowed to give in evidence under *non demisit* or *tenuit*, any matter amounting to *nil habuit in tenementis*, not even though the title of the avowant be founded in fraud; *Parry v. House, Holt*, 489; for a tenant shall not be allowed to dispute the title of his landlord, *ante*, *p.* 183. And where the plaintiff in replevin came into the occupation of premises under a person who had submitted to a distress by the defendant, it was held, that he could not dispute the title of the de-

fendant, though the latter had put in evidence a deed which showed that the plaintiff's predecessor occupied under a lease to which the defendant was a stranger. *Cooper v. Blandy*, 1 *Bingh. N. C.* 45. But where the plaintiff came in under another person and not under the defendant, but had paid rent to the defendant, in ignorance of a defect in his title, the court of Common Pleas held that the plaintiff might show the want of title in the defendant. *Rogers v. Pitcher*, 6 *Taunt.* 202. *Gregory v. Doidge*, 3 *Bingh.* 474. So under the plea of *non tenuit* the plaintiff may show that the defendant's title expired before the rent became due; *Gravenor v. Woodhouse*, 1 *Bingh.* 38; thus where a person, having an equitable title only, made a lease, and afterwards assigned all his interest at law and in equity, and then brought ejectment, the tenant was permitted to show the assignment as an answer to the action; *Doe dem. Marriott v. Edwards*, 6 *C. and P.* 208, 5 *B. and Ad.* 1065, *S. C.*; and he may show his landlord's title expired, though he has paid rent to him after such expiration, provided the rent was paid in ignorance of the landlord's title. *Fenner v. Duplock*, 2 *Bingh.* 10. Land belonging to a parish was occupied by A., who paid rent to the churchwardens. The latter executed a lease of the land for a term of years to B., and gave A. notice of the lease. It was held that A. was not estopped, by having paid rent to the churchwardens, from disputing B.'s title, and that the latter could not derive a valid title from the churchwardens. *Phillips v. Pearce*, 5 *B. and C.* 433, 8 *D. and R.* 43, *S. C.* It is no variance, under *non tenuit*, if it appear that the plaintiff held for a less time than that stated in the avowry. *Forty v. Imber*, 6 *East*, 434.

Evidence on plea in bar of riens in arrear.] The plea in bar of *riens in arrear*, which lies upon the plaintiff, admits the demise as stated in the avowry. Therefore where, to an avowry for rent due upon a *quarterly* holding, the plaintiff pleads *riens in arrear*, he cannot show that the holding is *half-yearly*, and that consequently no rent had accrued, though one of the quarters had elapsed. *Hill v. Wright*, 2 *Esp.* 669. It will not be sufficient to support this plea to show that *part* of the rent has been satisfied, for the defendant will be entitled to a verdict if it appear that any part of the rent is in arrear. *Cobb v. Bryan*, 3 *B. and P.* 348. The plaintiff may, as it seems, under this plea, show that he has paid the rent to a superior landlord under threat of a distress, for such payment seems to be in law a payment to the immediate landlord, so as to leave no rent in arrear. *Taylor v. Zamira*, 6 *Taunt.* 524. *Sapsford v. Fletcher*, 4 *T. R.* 513, where the defence was specially pleaded. *But see* 2 *Phill. Ev.* 180. The payment is no less compulsory though the ground-landlord has allowed the

occupier time to pay. *Carter v. Carter*, 5 *Bingh.* 406. So where a demand in respect of interest on a mortgage affecting the premises is paid, with the defendant's assent, the plaintiff may avail himself of the payment under this plea. *Dyer v. Bowley*, 2 *Bingh.* 94; *and see Pope v. Biggs*, 9 *B. and C.* 245. Where the plaintiff pleads *non tenuit* and *riens in arrear*, and the first issue is found for him, the second issue becomes immaterial, and the proper course is to discharge the jury from finding any verdict upon it. *Cossey v. Diggons*, 2 *B. and A.* 546.

Evidence on traverse of being bailiff.] If the plaintiff traverses that the defendant is bailiff, as stated in the cognizance, the defendant must prove his authority to make the distress, and a recognition of this act will be equivalent to a previous command. *Trevillian v. Pine*, 11 *Mod.* 112, 1 *Saund.* 347, *d.* (*n*). One jointenant or coparcener has an authority in law, without any express command, to distrain as bailiff of his cotenant. *Leigh v. Shepherd*, 2 *B. and B.* 466. A corporation may appoint a bailiff to distrain, without deed. *Smith v. Birmingham Gas Comp.* 1 *Ad. and Ell.* 526.

Evidence where the defendant avows taking the cattle damage feasant.] Where the defendant avows taking the cattle damage feasant, he may plead that the *locus in quo* is his soil and freehold, which the plaintiff may deny, and the evidence in such case will be the same as under the plea of *liberum tenementum* in trespass *quare clausum fregit*. *Vide post.* So the plaintiff may plead in bar defect of fences, which the defendant was bound to repair, whereby the cattle escaped; a right of common, way, &c. So the plaintiff may plead tender of amends before the distress, which makes the taking wrongful. *Com. Dig. Pleader*, (3 *K.* 23).

Evidence on plea of tender.] To an avowry for rent the plaintiff may plead a tender of the rent; to an avowry for damage feasant a tender of amends. A plea to an avowry for rent, of a tender of 16*l.* is not supported by proof of a tender of 15*l.* 16*s.*, though no more rent be due than the sum proved to have been tendered. *John v. Jenkins*, 1 *Cr. and M.* 227. A tender before distress makes the taking unlawful; after distress, and before impounding, the detention unlawful, *Six Carpenters' case*, 8 *Rep.* 146, *b.* Although it has been held that a tender of amends to a mere bailiff is not good; *Pilkington's case*, 5 *Rep.* 76, 1 *Brownl.* 173; yet if the bailiff is the avowant's usual receiver, or if it appear, from other circumstances, that he is his agent for that purpose, the tender to him is good. *Gilb. Repl.* 89, *Browne v. Powell*, 4 *Bingh.* 230. But a tender

to him is bad, if the avowant is present; *Gilb. Repl.* 89; and so is a tender to one deputed by the bailiff. *Pimm v. Grevill*, 6 *Esp.* 95. Tender either to the landlord or to his bailiff who makes the distress is sufficient. *Smith v. Goodwin*, 4 *B. and Ad.* 413, 1 *Nev. and M.* 371, *S. C.*

Competency of witnesses.

The declarations of a person, under whom the defendant makes cognizance, are not, it has been ruled, evidence for the plaintiff. *Hart v. Horn*, 2 *Campb.* 92. But such declarations should seem upon principle to be evidence, for if such person should be produced as a witness for the defendant making cognizance, he would be incompetent. *Golding v. Nias*, 5 *Esp.* 273. *See* 4 *Nev. and M.* 234. Thus, in replevin by an under-tenant against the superior landlord, who distrains as bailiff of his immediate tenant, the latter is not a competent witness to prove the amount of rent due to the under-tenant. *Upton v. Curtis*, 1 *Bingh.* 210, 8 *B. Moore*, 52, *S. C.* Upon this case Lord Denman, C. J., delivering the opinion of the court, in *King v. Baker*, 4 *Nev. and M.* 234, observed, "There is reason to suppose the facts are not reported with perfect accuracy. The court only held that an intermediate tenant, under whom cognizance had been made (the distress being taken by the landlord), was not admissible to prove the amount of the subtenant's rent. This may have been because he had an interest in reducing his own rent by raising that of his tenant." Where the defendant made cognizance, 1st, under a demise by A. to B., and 2dly, under a demise from B. to the plaintiff, and there was a plea of *non tenuit*, and at the trial the defendant abandoned his second cognizance, it was held that he might call B. as a witness; abandoning the issue being equivalent to consenting that a verdict should be found against him. *King v. Baker*, 4 *Nev. and M.* 228.

The sureties in the replevin bond are incompetent witnesses for the plaintiff. *Bailey v. Bailey*, 1 *Bingh.* 92.

The defendant avowed that the plaintiff and one J. B. held the *locus in quo* as tenants to the defendant, &c., upon which issue was joined. At the trial some evidence was given by the defendant that the plaintiff and J. B. were in possession of the premises in question, and also that a lease had been executed to them by the defendant's ancestor, which the plaintiff and J. B. had paid for, but had refused to execute. It was not proved that J. B. was so connected with the plaintiff, as to the premises in question, as to be jointly liable for the rent, nor was it shown that the goods distrained were the joint property of the plaintiff and J. B. The plaintiff tendered J. B. as a witness, who was rejected, without being examined on the *voir dire* as to his liability to the rent. It was held that he

was not an incompetent witness until that fact was established, and that he had been improperly rejected. *Bunter v. Warre*, 1 *B. and C.* 689.

TRESPASS FOR CRIM. CON.

In an action of trespass for criminal conversation, the plaintiff must prove, 1, His marriage, and 2, The fact of adultery. It is usual also to give evidence of circumstances in aggravation.

Evidence of marriage.] In this action the plaintiff is held to strict proof of his marriage, and proof of cohabitation and reputation is insufficient. *Morris v. Miller*, 4 *Burr.* 2057. *Birt v. Barlow*, 1 *Dougl.* 170. *B. N. P.* 27. Even the admission of the defendant has been held to be insufficient, as where, being surprised at a lodging with the wife of the plaintiff, Major Morris, and being asked where Major Morris's wife was, he replied, "In the next room," for it was only a confession that she went by the name of Major Morris's wife. *Morris v. Miller, B. N. P.* 28, 4 *Burr.* 2057. This decision, however, does not warrant the conclusion that a distinct and full acknowledgment of the marriage made by the defendant himself will not be evidence as against him, and sufficient to dispense with the more formal and strict proof of marriage. 2 *Phill. Ev.* 201; *and see Freeman's case,* 1 *East, P. C.* 470. In *Rigg v. Curgenven*, 2 *Wils.* 399, where the case of *Morris v. Miller* was cited, it was said by the court, that if it were proved that the defendant had seriously or solemnly recognised that he knew the woman to be the plaintiff's wife, it would be evidence proper to be left to the jury without proving the marriage. The marriage is usually proved by the production of an examined copy of the register; and it is not necessary in such case to call the attesting witnesses, but some proof of the identity of the parties must be adduced. *Ante, p.* 79, *and see Hemmings v. Smith*, 4 *Dougl.* 29. So it may be proved by calling a person who was present at the marriage, without proving the registration or license, or banns, *ante, p.* 79, though evidence of non-publication of banns may be given by the defendant, *vide post.*

If the marriage has taken place under stat. 26 Geo. 2, c. 33, s. 1, in a public chapel in which banns have been usually published, the plaintiff must prove that it was a chapel in which banns had been usually published at the time of the passing of the marriage act, 26 Geo. 2. *See R. v. Northfield*, 2 *Dougl.* 658. And where a register of marriages, going back to the year 1578, and a register of the publication of banns from

the year 1754 (when the marriage act passed,) were produced from the chapel royal in the Tower, Lord Ellenborough held that there was sufficient evidence upon which to found a presumption that banns had usually been published, before the marriage act, in that chapel. *Taunton v. Wyborn*, 2 *Campb.* 297. Marriages in chapels erected and consecrated since the 26 Geo. 3, have been rendered valid by various retrospective statutes. *See* 21 Geo. 3, c. 53, 44 Geo. 3, c. 77, 48 Geo. 3, c. 127, *and* 6 Geo. 4, c. 92. And by these statutes the registers, or copies of the registers of such marriages, are to be received in evidence. By 6 Geo. 4, c. 92, s. 2, it shall be lawful for marriages to be *in future* solemnised in all churches and chapels erected since the passing of 26 Geo. 2, and consecrated, in which churches and chapels it has been customary and usual, before the passing of that act (6 Geo. 4,) to solemnise marriages, and the registers of such marriages, or copies thereof, are declared to be evidence. By stat. 4 G. 4, c. 76, s. 2 (after 1 Nov. 1823), " All banns of matrimony shall be published in an audible manner in the parish church, or in some public chapel, in which chapel banns of matrimony may now or may hereafter be lawfully published, of or belonging to such parish or chapelry wherein the persons to be married shall dwell; and by sec. 3, the bishop of the diocese, with the consent of the patron and the incumbent of the church of the parish in which any public chapel, having a chapelry thereunto annexed, may be situated, or of any chapel situated in an extra-parochial place, signified to him under their hands and seals respectively, may authorise, by writing under his hand and seal, the publication of banns, and the solemnisation of marriages in such chapels, for persons residing in such chapelry or extra-parochial place; and such consent, together with such written authority, shall be registered in the registry of the diocese."

The marriage acts of 21 Geo. 3, c. 33, and 4 Geo. 4, c. 76, do not extend to the marriages of *Jews* and *Quakers*, such marriages being expressly excepted, and they may therefore be proved in the same manner as marriages were proved before the passing of those acts. In order to prove a Jewish marriage two witnesses were called, who swore that they were present at the marriage in the synagogue; but upon an objection made, that what took place at the synagogue was merely a ratification of a previous written contract, and that as that contract was essential to the validity of the marriage, it ought to be produced and proved, the contract was put in. *Horn v. Noel*, 1 *Campb.* 61. As to the form of this contract, *see Lindo v. Belisario*, 1 *Hag. Con.* 225, 247, *app. p.* 9, *see also Goldsmid v. Bromer*, 1 *Hag. Con.* 324. If the plaintiff is a Quaker, the marriage must be proved to have taken place according to the ceremonies of that sect. 1 *Hag. Con. appendix, p.* 9 (*n*).

Deane v. Thomas, *M. and M.* 361. As to the marriages of other dissenters, there is no exception in the marriage acts; and though, before those acts, it seems to have been sufficient to prove a marriage according to their particular ceremonies, *see Woolston v. Scott*, *B. N. P.* 28, such proof is now insufficient. *See* 1 *Hag. Con. appendix*, 8 (*n*).

The marriage acts do not extend to marriages abroad, and a marriage celebrated abroad, according to the law of the foreign state, is recognised in this country as a valid marriage. Therefore a marriage in Scotland, between English subjects, according to the Scotch law, is good in our courts. *Dalrymple v. Dalrymple*, 2 *Hag. Con.* 54. *Harford v. Morris*, *Id.* 430. Where two persons in the island of St. Domingo, being desirous of intermarrying, went to a chapel where the service was read in French, by a person habited as a priest, and interpreted into English by the officiating clerk, which service the parties understood to be the marriage service of the Church of England, and they received a certificate of the marriage, which had been lost, this evidence was held (no proof being given of the laws or usage respecting the marriage ritual in that island) to afford a presumption that the marriage had been duly celebrated according to the law of St. Domingo, particularly after eleven years' cohabitation as man and wife. *R. v. Brampton*, 10 *East*, 282. So a marriage in Ireland by a dissenting minister, in a private room, has been held good. *R. v. ——*, *Old Bailey, coram Sir J. Silvester*, 1 *Russ. C. L.* 205, *2d ed.*, *Smith v. Maxwell*, *R. and M.* 80. In proving a foreign marriage some evidence must be given of the law of the foreign state; and it is the practice of the ecclesiastical courts to receive such evidence from professors of the law in question. *Lindo v. Belisario*, 1 *Hag. Con.* 248. *Middleton v. Janverin*, 2 *Hag. Con.* 441; *but see Harford v. Morris*, 2 *Hag. Con.* 431. In the case of *Dalrymple v. Dalrymple*, 2 *Hag. Con.* 81, the authorities upon which the court proceeded were of three classes: 1, The opinions of learned professors given in that or similar cases; 2, The opinions of eminent writers, as delivered in books of great legal credit and weight; and, 3, The certified adjudication of the tribunals of Scotland. Where evidence of the law of Scotland with regard to the legality of a marriage was required, the testimony of a witness, who was a tobacconist, was rejected. *Anon. cited* 10 *East*, 287. *See further as to proof of foreign laws, ante, p.* 77, 78.

A marriage between British subjects in a British settlement is valid, if it be such a marriage as would have been valid in this country before the passing of the marriage act, 26 Geo. 2. Thus a marriage between two British subjects, solemnised by a Catholic priest at Madras, and followed by cohabitation, but without the license of the governor, which it had been the uniform custom to obtain, is valid. *Lautour v. Teesdale*,

8 *Taunt.* 833, 2 *Marsh.* 243, *S.C.* So in the case of the *King v. Brampton, supra,* Lord Ellenborough was of opinion that as the parties had accompanied the King's forces to St. Domingo, they might be considered to have carried with them the law of England, and that therefore the marriage was valid, being according to the English law independent of the marriage act.

So the marriage of English subjects, in the chapel of the English ambassador abroad, appears to have been valid; *see R. v. Brampton,* 10 *East,* 286; and now by statute 4 Geo. 4, c. 91, s. 2, reciting that it is expedient to relieve the minds of his majesty's subjects from any doubt concerning the validity of a marriage solemnised by a minister of the church of England, in the chapel or house of any British ambassador, or minister, residing within the country to the court of which he is accredited, or in the chapel belonging to any British factory abroad, as well as from any possibility of doubt concerning the validity of marriages solemnised within the British lines, by any chaplain, or officer, or other person officiating under the orders of the commanding officer of a British army serving abroad, it is *declared* and enacted that all such marriages shall be deemed and held to be as valid in the law, as if the same had been solemnised within his majesty's dominions, with a due observance of all forms required by law.

A marriage between English subjects in a foreign country, not celebrated according to the laws of that country, nor in an ambassador's chapel, &c., is invalid. *Middleton v. Janverin,* 2 *Hag. Con.* 437. *Scrimshire v. Scrimshire, id.* 395. *Lacon v. Higgins,* 3 *Stark.* 183.

Proof of the adultery.] "It is not necessary to prove the direct fact of adultery. In every case, almost, the fact is inferred from circumstances that lead to it by fair inference as a necessary conclusion. What are the circumstances that lead to such a conclusion cannot be laid down universally, because they may be infinitely diversified by the situation and character of the parties, by the state of general manners, and by many other incidental circumstances apparently slight and delicate in themselves, but which may have most important bearings in the particular case.—The only general rule that can be laid down upon the subject is, that the circumstances must be such, as would lead the guarded discretion of a reasonable and just man to the conclusion." *Per Sir W. Scott, Loveden v. Loveden,* 2 *Hag. Con.* 2. Where the plaintiff's wife and the defendant travelled together, and the former took a house in Wales, where the defendant used to pass the day and take his meals, but slept at an inn, the Ecclesiastical Court held this cohabitation sufficient evidence of adultery, though there was no proof of other familiarities. *Cadogan v. Cadogan,*

2 *Hag. Con.* 4 (*n*); *and see Chambers v. Chambers*, 1 *Hag. Con.* 444. *Williams v. Williams, Id.* 299. *Elwes v. Elwes, Id.* 277. In a case before the delegates, where the chief evidence relied on was that the wife had been seen going into a house of ill fame with a man, the adultery was held to be proved; and Mr. Justice Buller observed that there were many cases in the King's Bench, where the adultery was established on presumptive evidence. *Wood v. Wood*, 4 *Hagg. Eccl. Rep.* 138 (*n*). Where the statute of limitations is pleaded, the plaintiff may give evidence of acts of adultery which have taken place more than six years since, with a view to show the nature of the connection subsisting between the parties within the six years. *Duke of Norfolk's case*, 12 *How. St. Tr.* 927. The confession of the wife is not evidence for her husband, but conversations between her and the defendant are evidence against the latter. *B. N. P.* 28, *ante, p.* 112.

Evidence in aggravation.] Conversations between the husband and wife are evidence to show their demeanour and conduct. *Trelawney v. Coleman*, 1 *B. and A.* 91. So letters from the wife to the husband, or to a third person, written before suspicion of criminal intercourse. *Ante, p.* 112. In an action for *crim. con.*, where the adultery was committed on board ship, during a voyage, it was held that a witness might be asked whether the wife did not keep a journal, and for what purpose she said she kept it. *Jones v. Thompson*, 6 *C. and P.* 415. The judgment formed by a witness from the anxiety which the wife had expressed concerning her husband, and from her mode of speaking of him during his absence, is admissible evidence. *Trelawney v. Coleman*, 2 *Stark.* 192. The wife's declarations as to her intentions in leaving her husband may be given in evidence, as part of the *res gestæ*, to remove a suspicion of connivance on his part. *Hoare v. Allen*, 3 *Esp.* 276, *ante, p.* 31. Proof of a settlement and provision for children is admissible evidence in aggravation. *B. N. P.* 27. As to evidence of the wife's character, *see ante, p.* 51.

Evidence of the amount of the defendant's property is not admissible with a view to damages. *James v. Beddington*, 6 *C. and P.* 589.

Defence.

Evidence to disprove the marriage.] If the marriage of the plaintiff be irregular and void, the defendant may give evidence to prove that fact. Thus he may show that there was no due publication of banns; for by 4 Geo. 4, c. 76, s. 22, if any persons shall knowingly and wilfully intermarry without due publication of banns, or license, such marriage shall be null and void. Under this clause it seems to be sufficient that the banns are published in the known and acknowledged,

though not the real names of the parties. Thus where a man whose name was A.L., had resided for three years in the parish in which he was married, under the name of G. S. and was married by banns by such name, the marriage was held valid. *R. v. Billinghurst*, 3 *Maule and S.* 250. So where the name had been assumed for sixteen weeks, on account of the party having deserted from the army. *R. v. Burton-upon-Trent*, *Id.* 537. So where a married woman, upon the death of her husband, assumed her maiden name, and after the lapse of several years was married by banns to a second husband in that name, with the description of widow, it was held, in the absence of fraud, that such marriage was legal. *R. v. St Faith's, Newton*, 3 *D. and R.* 348. But where the banns have been published in the wrong names of the parties, and there is no evidence to show that they have ever been known by such names, the marriage is void. *Mather v. Ney, in the Consistory Court*, 3 *Maule and S.* 265; *see also Stanhope v. Baldwin*, 1 *Addams*, 93; *Green v. Dalton*, *Id.* 289. So where a wrong name is fraudulently assumed for the purposes of the marriage. *Frankland v. Nicholson, in the Consistory Court*, 3 *Maule and S.* 259; *see also Fellowes v. Stewart*, 2 *Phillim.* 257; *Meddowcroft v. Gregory*, *Id.* 365; *Bayard v. Morphew*, *Id.* 321; *Pouget v. Tomkyns*, 3 *Maule and S.* 264.

The rules on this subject are fully laid down by Lord Tenterden in *R. v. Inhab. of Tibshelf*, 1 *B. and Ad.* 195. But this case being decided upon the construction of the former marriage act, 26 Geo. 2, must be taken subject to the limitation established in the case of *R. v. Wroxton*, 4 *B. and Ad.* 640, in which case it was held that where the intended husband procured the banns to be published in a Christian and surname, which the woman had never borne, but she did not know that fact until after the solemnisation of the marriage, such marriage was good. *Id. See Wiltshire v. Prince*, 3 *Hagg.* 332. "These rules are fully established, first, if there be a total variation of name or names, that is, if the banns are published in a name or names totally different from those which the parties, or one of them ever used, or by which they were ever known, the marriage in pursuance of that publication is invalid, and it is immaterial in such cases, whether the misdescription has arisen from accident or design, or whether such design be fraudulent or not.

"But, secondly, if there be a partial variation of name only, as the alteration of a letter or letters, or the addition or suppression of one Christian name, or the names have been such as the parties have used, and been known by, at one time and not at another, in such cases the publication may or may not be void; the supposed misdescription may be explained, and it becomes a most important part of the inquiry, whether it was consistent with honesty of purpose, or arose from a fraudulent

intention. It is in this class of cases only, that it is material to inquire into the motives of parties."

By 4 Geo. 4, c. 76, s. 26, it shall not be necessary, in support of a marriage, to give any evidence of the residence of the parties, as directed in that act, nor shall any evidence be received to prove the contrary.

Evidence that the parties lived separate.] Whether proof that, at the time of the adultery, the husband and wife were living separate by consent, furnishes a defence in this action, does not appear to be clearly settled. In *Weedon v. Timbrell*, 1 *Esp.* 16, 5 *T. R.* 357, *S. C.*, where it appeared that the husband, having some suspicion of his wife's misconduct, had taken a lodging for her, for which and for her board he paid, and that at the time when the adultery was committed, they were living in a state of separation, Lord Kenyon ruled that the action could not be maintained, and the court refused to set aside the nonsuit. So in *Bartelot v. Hawker*, *Peake*, 7, where the husband and wife had been separated by articles, Lord Kenyon said, that if the parties were separated by mutual consent at the time, he was of opinion that the husband could not maintain this action, for it was impossible to receive any injury by losing the society of a wife whom he had already abandoned; but on proof of an act of adultery *before* the separation, the jury found a verdict for the plaintiff. In a subsequent case, however, where the defence was that the parties were living under articles of separation at the time, Lord Kenyon said that it was a question that he had entertained considerable doubts upon, but that he was inclined to suffer the cause to proceed, and take a note of the objection, that it might be brought before the court. *Hodges v. Windham*, *Peake*, 39. And in a still more recent case, where the husband and wife had separated under articles, and the wife was living apart from her husband, though not in pursuance of the terms of the articles, Lord Ellenborough observed that he did not consider the question, whether the mere fact of separation between husband and wife by deed, was such an absolute renunciation of his marital rights, as prevented the husband from maintaining an action for the seduction of his wife, as concluded by the decision in *Weedon v. Timbrel*. *Chambers v. Caulfield*, 6 *East*, 248. In the latter case it was held, that as the wife was not living apart from her husband, with the consent of the trustees in the deed, she was not living apart from him with his consent, and that therefore the plaintiff's right to recover was not affected by the deed. Where the separation is not with a view of renouncing the marital character, as where the husband and wife are living as servants in different families, the action may be maintained. *Edwards v. Crock*, 4 *Esp.* 39.

Evidence of the plaintiff's misconduct in bar.] If a woman be suffered to live as a prostitute, with the privity of her husband, and a man is thereby drawn into adultery with her, Lord Mansfield laid it down as clear law, that the act'on will not lie. *Smith v. Ellison, B. N. P.* 27. *Hodges v. Windham, Peake,* 39. But unless with the husband's privity it will not go to the action, let her be ever so profligate, but only to the damages. *B. N. P.* 27. If the plaintiff was consenting to the adultery of his wife, he cannot recover. *Howard v. Burtonwood,* 1 *Selw. N. P.* 10. *Duberley v. Gunning,* 4 *T. R.* 656. *Hoare v. Allen, Selw. N. P.* 11 (*n*), 3 *Esp.* 276. Where, after marriage, the husband has openly violated those rules of conduct which decency requires and affection exacts from him, if he has openly practised his gallantries without regard to his wife, and violated the marriage bed, so as to create disgust or unhappiness in his wife, he cannot maintain this action. *Per Lord Kenyon, Stuart v. Marquis of Blandford, cited* 4 *Esp.*17. *Wyndham v. Ld. Wycombe,* 4 *Esp.* 16. But in a subsequent case, Lord Alvanley said, that though he was aware that Lord Kenyon had laid down a different doctrine, he was of opinion that the infidelity or misconduct of the husband could never be set up as a legal defence to the adultery of the wife, but that it went in mitigation of damages only. *Bromley v. Wallace,* 4 *Esp.* 237.

Evidence in mitigation of damages.] Proof of the husband's bad conduct, as that he lived in a criminal connection with other women, is proper evidence in mitigation of damages. *B. N. P.* 27. *Bromley v. Wallace,* 4 *Esp.* 237. So that he had turned his wife out of the house, and refused to maintain her. *B. N. P.* 27. And declarations of the wife, made before the criminal intercourse, as to the ill treatment by the husband, are admissible in mitigation. *Winter v. Wroot,* 1 *Moo. and Rob.* 404. So for the same purpose the defendant may give evidence of the wanton manners of the wife, and that the first advances were made by her to him. *Gardener v. Jadis,* 1 *Selw. N. P.* 25. So that the wife has committed adultery with others, or had a bastard before marriage. *Roberts v. Malsten, B. N. P.* 296. Though evidence of loose conduct or criminality with others, before the commission of the fact complained of, is admissible in mitigation of damages, yet acts of subsequent misconduct are not. *Per Lord Kenyon, Elsam v. Faucett,* 2 *Esp.* 562. Although in general the letters of the wife to the defendant are not evidence for him; *Baker v. Morley, B.N.P.* 28; yet where they had been written before the time when the criminal facts were proved to have been committed, Lord Kenyon admitted them, the object being to show that the defendant had been solicited by the wife. *Elsam v. Faucett,* 2 *Esp.* 562.

TRESPASS FOR SEDUCTION.

In an action for seduction, the plaintiff must prove, (if denied) 1, That the party seduced was, in contemplation of law, his servant; and, 2, The seduction.

Evidence of the service.] Although this action cannot be maintained without some proof of the daughter's service, or liability to service; and it is not sufficient merely to show that the plaintiff has incurred an expense in consequence of her confinement; *Satterthwaite v. Duerst*, 5 *East*, 47 (*n*), 4 *Dougl.* 315. *S. C.*; *Postlethwaite v. Parkes*, 3 *Burr.* 1878; *Bennett v. Allcott*, 2 *T. R.* 168, *see* 4 *B. and C.* 662; yet it is not necessary to prove an actual contract of service, or that wages have been paid, but the slightest evidence of service, such as milking cows, has been held sufficient. *Bennett v. Allcott*, 2 *T. R.* 168. Even making tea has been said to be an act of service. *Per Abbott, C. J.*, *Carr v. Clarke*, 2 *Chitty*, 261; *see also Manvell v. Thompson*, 2 *C. and P.* 303; *Mann v. Barrett*, 6 *Esp.* 32. Though, to a degree, the relation of master and servant must subsist, yet a very slight relation is sufficient, as it has been determined, that when the daughters of the highest and most opulent families have been seduced, the parent may maintain an action on the supposed relation of master and servant, though every one must know that such a child cannot be treated as a menial servant. *Per Lord Kenyon*, *Fores v. Wilson*, *Peake*, 55. It has indeed been ruled by *Littledale, J.*, that the proof of any acts of service is unnecessary, and that it is sufficient that she is living with her father, forming part of his family, and liable to his control and command. *Maunder v. Venn*, *M. and M.* 324, *see R. v. Chillesford*, 4 *B. and C.* 102. The action is maintainable, though the daughter was of age. *Booth v. Charlton*, *cited* 5 *East*, 47; *Satterthwaite v. Duerst*, *Ibid.* (*n*). *Tullidge v. Wade*, 3 *Wils.* 18. And where the daughter was a married woman, separated from her husband, and living as a servant with her father, it was held that the latter might maintain this action. *Harper v. Luffkin*, 7 *B. and C.* 387.

It must appear that the daughter was residing with the plaintiff at the time of her seduction. Thus, where she was residing in another person's family in the capacity of housekeeper, though not under any contract for wages, and though she might have left when she pleased, it was held that the father could not maintain the action, for the daughter had no *animus revertendi*. *Dean v. Peel*, 5 *East*, 45; *Carr v. Clarke*, 2 *Chitty*, 260. But if she was merely absent on a visit, at the time when she was seduced, the action lies. *Johnson v. M'Adam*, *cited* 5 *East*, 47. Where the defendant procured the daughter and servant of the plaintiff to leave her father, under the false

pretence of hiring her as his servant, and seduced her, Abbott, C. J., held the action maintainable. *Speight v. Olivera*, 2 *Stark*. 493.

Where the action was brought by the aunt of the party seduced, with whom the latter resided, Perryn, B., held that she stood *in loco parentis*, and was entitled to recover, though the mother was living. *Edmondson v. Machell*, 2 *T. R.* 4, 11 *East*, 24. So where the plaintiff, an officer in the army, had adopted the daughter of a deceased soldier, he was held entitled to maintain this action. *Irwin v. Dearman*, 11 *East*, 23. So a master, who is not related to the party seduced, may recover damages against the defendant for debauching her. *Fores v. Wilson*, *Peake*, 55 ; *see Hall v. Hollander*, 4 *B. and C.* 663.

Evidence in aggravation.] In aggravation of damages the plaintiff may give evidence of the general good conduct of his family, what other children he has, &c. *Bedford v. M'Kowl*, 3 *Esp.* 119. So the plaintiff may prove that the defendant was addressing his daughter as an honourable suitor ; *Dodd v. Norris*, 3 *Campb.* 519 ; *Elliott v. Nicklin*, 5 *Price*, 641 ; but neither in chief nor on cross-examination can the plaintiff show that the defendant had previously made a promise of marriage to the daughter. *Ibid. Tullidge v. Wade*, 3 *Wils.* 19.

Damages.] Though the loss of service is the legal foundation of this action, and however difficult it may be to reconcile to principle the giving of greater damages on another ground, the practice is become inveterate, and cannot now be shaken. *Per Lord Ellenborough*, *Irwin v. Dearman*, 11 *East*, 24. Damages therefore may be given for the loss which the plaintiff has sustained, by being deprived of the society and comfort of his child, and by the dishonour which he receives. *Per Ld. Ellenborough*, *Southernwood v. Ramsden*, *Selw. N. P.* 1042. The jury may take into their consideration all that the plaintiff can feel from the nature of the loss. They may look upon him as a parent losing the comfort as well as the service of his daughter, in whose virtue he can feel no consolation, and as the parent of other children, whose morals may be corrupted by her example. *Per Ld. Eldon*, *Bedford v. M'Kowl*, 3 *Esp.* 120, *see also Chambers v. Irwin*, 2 *Selw. N. P.* 1042, *Tullidge v. Wade*, 3 *Wils.* 19.

The plaintiff must be prepared to prove the amount of the expenses sustained by him in consequence of his daughter's confinement, &c. *Tullidge v. Wade*, 3 *Wils.* 19. The amount of a surgeon's bill, though not paid, may be recovered, but a physician's fees cannot be taken into the account, if not actually paid, since the payment of them cannot be enforced by action. *Dixon v. Bell*, 1 *Stark.* 289.

Evidence of character.] The plaintiff cannot give evidence of the daughter's good character, unless in answer to evidence of *general* bad character on the other side; *Bamfield v. Massey*, 1 *Campb.* 460, *ante p.* 51; and even where the daughter had been cross-examined as to circumstances of extreme indelicacy and levity in her conduct, Lord Ellenborough ruled that the plaintiff was not at liberty to call witnesses to character, for that there was an opportunity of explaining, on re-examination, the questions put on the cross-examination. *Ibid.* But in another case, where the cross-examination of the party seduced went to show that she had conducted herself immodestly towards the defendant before the seduction, and that she kept improper company, the plaintiff was allowed, without objection, to prove the general good character and modest deportment of his daughter, and the general respectability of the family. *Bate v. Hill*, 1 *C. and P.* 100. If the daughter be asked, whether, before her acquaintance with the defendant, she had not been criminally connected with other men, she is not bound to answer the question. *Dodd v. Norris*, 3 *Campb.* 519.

Defence.

Where the plaintiff had been guilty of gross misconduct in suffering the defendant to continue his visits as a suitor to his daughter, after he knew that he was a married man, and had received a caution against admitting him into his family, Lord Kenyon held that the action could not be maintained. *Reddie v. Scoolt*, *Peake*, 240.

In mitigation of damages, the defendant may show the loose character of the daughter. *Dodd v. Norris*, 3 *Campb.* 519. So it seems that, upon principle, he may show that the father was a man of profligate habits.

TRESPASS FOR ASSAULT AND BATTERY.

In an action of trespass for assault and battery, the evidence for the plaintiff varies according to the nature of the defendant's plea.

Evidence under the general issue.] Under the general issue, the plaintiff must prove an assault or battery. An attempt to do a corporal injury to another, coupled with a present ability, as holding up a weapon at a man within reach, is evidence of an assault. *Genner v. Sparks*, 1 *Salk.* 79. Although, to constitute an assault, there must be a present ability, yet, if a man is advancing in a threatening attitude to strike another, so that the blow would almost immediately reach him, if he were not stopped, and he is stopped, this is an assault. *Stephens*

v. Myers, 4 *C. and P.* 349. So riding after a person, and obliging him to run into a garden, to avoid being beaten, is an assault. *Martin v. Shoppie*, 3 *C. and P.* 373. And where parish officers cut off the hair of a pauper, against his will, it was held an assault. *Ford v. Skinner*, 4 *C. and P.* 289. A battery, which always includes an assault, is the actual doing an injury, be it ever so small, in an angry or revengeful, or rude or insolent manner; as by spitting in a man's face, or violently jostling him out of the way. *B. N. P.* 15. In order to constitute a battery, it is not essential that the act should appear to be wilful; if it happens by negligence or mistake an action will lie, for no man shall be excused of a trespass, except it may be judged utterly without his fault. *Per Cur. Weaver v. Ward, Hob.* 134. *James v. Campbell*, 5 *C. and P.* 372. Therefore where a soldier in exercise wounded one of his comrades by accident, he was held liable in trespass. *Ibid. Underwood v. Hewson*, 1 *Str.* 596. But where the conduct of the defendant is entirely without fault, no action will lie. *Wakeman v. Robinson*, 1 *Bingh.* 213. *B. N. P.* 15. Thus, where the defendant and another person were fighting, and the plaintiff came and took hold of the defendant by the collar, in order to separate the combatants, whereupon the defendant beat the plaintiff, on *son assault demesne* pleaded, and replication *de injuriâ suâ propriâ*, it was objected that the plaintiff ought to have replied the matter specially, but Legge, B., overruled the objection, observing that the evidence was not offered by way of justification, but for the purpose of showing that there was not any assault, for it was the *quo animo* which constituted an assault, which was matter to be left to a jury. *Griffin v. Parsons*, 1 *Selw. N. P.* 27 (*n*). *Gibbons v. Pepper*, 2 *Salk.* 637. *Goodman v. Taylor*, 5 *C. and P.* 410.

Trespass does not lie for the execution of *irregular* process; before that action can be maintained, the process must be set aside. *Riddell v. Pakeman*, 2 *Crom. M. and R.* 30.

Where it is stated in the declaration that the defendant on divers days and times, between two certain days, assaulted the plaintiff, the plaintiff may give in evidence any number of assaults within those days, or he may prove a single trespass at any time before action brought; *B. N. P.* 86, 1 *Saund.* 24 (*n*); and even after proving several assaults within the days mentioned in the declaration, he would perhaps be allowed to give evidence of assaults committed before that time, as proof of the defendant's malice. 2 *Phill. Ev.* 194.

Where the declaration contains only one count, the plaintiff cannot, after giving evidence of one assault, waive that assault and give evidence of another. *Stante v. Prickett*, 1 *Campb.* 473. When the action is brought against several, for a joint trespass committed at a particular time, he must confine himself to that period; and if all the defendants were not then concerned in the trespass committed at that time, the plaintiff cannot have

recourse to a trespass committed at any other time, when some only of the defendants were concerned, who were not implicated in the first transaction, for some of the defendants might thereby be subjected to damages for a trespass in which they had no concern. *Sedley v. Sutherland*, 3 *Esp.* 202. So where the plaintiff proved a joint trespass against all the defendants, it was held that he could not waive that trespass and prove another against some of the defendants only, though there were two counts in the declaration. *Tait v. Harris*, 1 *Moo. and Rob.* 282, 6 *C. and P.* 83, *S. C. said, by Follett*, to have been ruled the same way by Lord Tenterden. 6 *C. and P.* 83.

By various statutes evidence in justification is admissible under the general issue. See stat. 43 Eliz. c. 2, s. 19, 7 Jac. 1, c. 5, 21 Jac. 1, c. 12, s. 5, 11 G. 2, c. 19, s. 21, 23 G. 3, c. 70, s. 34, 24 G. 3, sess. 2, c. 47, s. 35, 39, 28 G. 3, c. 37, s. 23, 42 G. 3, c. 85, s. 6, 43 G. 3, c. 99, s 70. *Tidd*, 704 (*n*).

Evidence under son assault demesne.] One of the most usual pleas in this action is *son assault demesne*, that the plaintiff made the first assault, a defence which must be specially pleaded. *Co. Litt.* 212, *b*. If to this plea the plaintiff reply *de injuriâ suâ propriâ absque tali causâ*, such replication puts the whole matter of the plea in issue, and the defendant will have to prove a prior assault by the plaintiff. If he prove that the plaintiff lifted up his stick, and offered to strike him, it is a sufficient assault to justify his striking the plaintiff, and he need not stay till the plaintiff has actually struck him. *B. N. P.* 18. But it is not every assault that will justify every battery, and it is matter of evidence whether the assault was proportionable to the battery; thus a man cannot justify a maim for every assault, as if A. strike B., B. cannot justify drawing his sword and cutting off A.'s hand. *Per Cur. Cooke v. Beal*, 1 *Ld. Raym.* 177. It seems, however, that in such case the plaintiff will not be allowed to take advantage of the excess in the violence of the defendant's assault, under the general replication of *de injuriâ*, but that he should reply the excess in order to entitle him to take advantage of it. *Skinner*, 387, *see Franks v. Morrice*, 10 *East*, 81 (*n*). Thus where the plaintiff declared that the defendant beat, bruised and wounded him, and the defendant pleaded *son assault demesne*, to which the plaintiff replied *de injuriâ* generally, and it appeared in evidence that the plaintiff, meeting the defendant, shook his stick at him; whereupon the defendant committed a violent assault upon the plaintiff, and beat him; on a verdict being found for the defendant, the court held that if the defendant had assaulted the plaintiff and beat him more violently than he ought to have done, or was necessary for the defence of himself, the plaintiff ought to have replied that fact specially. *Dale v. Wood*, 7 *B. Moore*, 33. *Bowen v. Parry*, 1 *C. and*

P. 394. But where the plea justifies a *battery* as well as an assault, and the plaintiff proves it, the defendant must prove enough of his plea to justify the battery, and the plaintiff need not new assign. *Per Bayley, B., Lambe v. Barnet,* 1 *Crom. and Jer.* 294. *Reece v. Taylor,* 4 *Nev. and M.* 469. Where the plaintiff can justify his first assault, he must plead such matter of justification specially, for it cannot be given in evidence under the replication *de injuriâ, &c. King v. Sheppard, Carth.* 281, *B. N. P.* 18.

Where there is only one count in the declaration, and the defendant pleads *son assault demesne,* and proves an assault by the plaintiff on the day mentioned in the declaration, or on another day before action brought, the plaintiff will not be entitled to give evidence of an assault committed by the defendant on another day. *Downes v. Skrymsher,* 1 *Brownl.* 235. *B. N. P.* 17. *Roll. Ab. Trial* (c). If in fact there are two assaults, one only of which the defendant can justify, and he pleads *son assault demesne,* the plaintiff should new assign; but if there are two counts in the declaration, the new assignment will be unnecessary, for as the defendant can only prove one justification, the plaintiff on proving two assaults must have a verdict. *B. N. P.* 17. Yet where there are two counts, if the defendant pleads not guilty, and a justification, and in his justification alleges that the trespasses in both counts are one and the same, and the plaintiff replies *de injuriâ, &c.,* he will be confined to the proof of one trespass only. *Gale v. Dalrymple, R. and M.* 118. *Gibson v. Hawkey, Id.* 121 (*n*). In some cases if there are two counts in the declaration, the plaintiff, by new assigning, may preclude himself from giving evidence of two acts of trespass. Thus where the declaration contained two counts for assault and false imprisonment, and the defendant pleaded not guilty to both counts, and a justification under mesne process to the first count, and the plaintiff, as to the justification, new assigned, whereby he admitted that the arrest under the mesne process was justified, and then gave in evidence another act of imprisonment under the new assignment, upon which he failed, it was held that he could not give evidence of either act of trespass under the second count, for that there was but one imprisonment besides that which he had waived, and *that* one being the subject of the new assignment, the plaintiff could not avail himself of it on the second count. *Atkinson v. Matteson,* 2 *T. R.* 172.

Evidence on plea of justification in defence of possession.] If the defendant pleads that he was possessed of a house, &c. and that the plaintiff, without his licence, entered therein and disturbed the defendant, whereupon he requested the plaintiff to depart, which he refused to do, whereupon the defendant gently laid hands upon him to turn him out of the house; the

proof of this plea lies upon the defendant, and he must show his possession of the house, the plaintiff's entry and disturbance, that he requested the plaintiff to depart, and on his refusal gently laid hands on him. If the plaintiff resist the defendant upon his gently laying hands on him, the defendant may repel force with force, and any degree of violence may be justified; *Green v. Goddard*, 2 *Salk.* 641; which may, it seems, be properly given in evidence under the above plea, if the plaintiff has replied *de injuriâ* only. If the plaintiff enter forcibly into the defendant's house, the latter may resist force by force, without any previous request to depart, but the justification in such case should not be pleaded by way of *molliter manus imposuit*, upon which it would be necessary to show a previous request to depart; the defendant should plead that the plaintiff with strong hand endeavoured forcibly to break and enter the defendant's close, whereupon the defendant resisted and opposed such entrance, &c. and that if any damage happened to the plaintiff it was in the defence of the possession of the close. If in fact the defendant was guilty of an excess of violence in resisting the plaintiff, the latter should new assign such excess. *Weaver v. Bush*, 8 *T. R.* 78. A person who hires a steam-boat for a day for a party, has not such an exclusive possession as to justify him in excluding a stranger. *Dean v. Hogg*, 10 *Bingh.* 345.

In an action for an assault and battery and false imprisonment, the battery may be justified under a *molliter manus imposuit*, and if there was an excessive or subsequent battery, the plaintiff should new assign. *B. N. P.* 19. *Willes*, 17 (*n*). 2 *Saund.* 296 (*n*).

Evidence under alia enormia.] Nothing can be given in evidence under *alia enormia* except acts which could not be put upon the record. *Per Lord Kenyon, Lowden v. Goodrick, Peake*, 46. Therefore in an action for trespass and false imprisonment it was ruled that the plaintiff could not show that he had been stinted in his food; *ibid.*; or that he caught the jail fever. *Pettit v. Addington, Id.* 62.

Damages.] Evidence may be given of the circumstances which accompany and give a character to the trespass, in order to enhance the damages. *Bracegirdle v. Orford*, 2 *Maule and S.* 79. The circumstance of time and place, when and where the insult was given, require different damages; as it is a greater insult to be beaten upon the Royal Exchange than in a private room. *Per Bathurst, J., Tullidge v. Wade*, 3 *Wils.* 19. *Vide post, p.* 473.

Defence.

Although the defendant cannot, under the general issue,

give in evidence matter of defence amounting to a justification, yet he may, as it seems, give any circumstance in evidence, in mitigation, which tends to reduce the quantum of damages, and which could not have been pleaded. 3 *Stark. Ev.* 1460. *Vin. Ab. Ev.* (I *b*,) *pl.* 16. 2 *B. and P.* 225 (*n*). So in trespass for false imprisonment against a private individual, evidence of reasonable suspicion of the plaintiff's having been guilty of the felony, is admissible on the general issue in reduction of damages. *Chinn v. Morris, R. and M.* 424. So in trespass for false imprisonment against the captain of a ship, Buller, J., admitted, under the plea of not guilty, evidence of expressions used by the plaintiff at the time, tending to create mutiny and disobedience, for every thing which passed at the time is part of the transaction on which the plaintiff's action is founded, and he therefore cannot be surprised by the evidence. *Bingham v. Garnault,* 1 *Esp. Dig.* 337. *B. N. P.* 17, *S. C.* But in trespass for assault and battery, on not guilty pleaded, evidence was offered that the beating in question was given by way of punishment for misbehaviour on board the ship of which defendant was captain, and it was insisted that the conduct of the defendant at the time of the assault being necessarily in evidence proved that misbehaviour, but Lord Eldon C. J., was of opinion that as there was no justification pleaded, the jury should give damages to the amount of the injury suffered, without lessening them on account of the circumstances under which it was inflicted, and the court of Common Pleas were of opinion that this direction was right. *Watson v. Christie,* 2 *B. and P.* 224.

TRESPASS FOR FALSE IMPRISONMENT.

In an action of trespass for false imprisonment, the plaintiff must prove the fact of imprisonment and the amount of damages.

Form of action with regard to justices, &c.] In actions against justices and others having authority to imprison, it frequently becomes a question, whether the proper form of action is trespass or case. " The general rule of law as to actions of trespass against persons having a limited authority (as Commissioners of bankrupt) is plain and clear. If they do any act *beyond* the limit of their authority, they thereby subject themselves to an action of trespass; but if the act done be *within* the limit of their authority, although it may be done through an erroneous or mistaken judgment, they are not thereby liable to such an action." *Per Abbott, C. J., Doswell*

v. Impey, 1 *B. and C.* 169, *Lowther v. Earl of Radnor*, 8 *East*, 113. *Pike v. Carter*, 3 *Bingh.* 78, 10 *B. Moore*, 376, *S. C.* Where the magistrate exercises the legal authority vested in him, in a harsh, undue, or oppressive manner, it does not appear to be decided whether any action can be maintained against him, but if an action can be supported, case and not trespass is the remedy. *See Willes v. Bridger*, 2 *B. and A.* 286. But where a magistrate acts without those circumstances, which must concur to give him jurisdiction, as where he maliciously grants a warrant, without information, upon a supposed charge of felony, he is liable in trespass. *Morgan v. Hughes*, 2 *T. R.* 225. Where a magistrate commits a person for re-examination for an unreasonable time, it seems that the commitment is wholly void, at all events he is answerable in trespass, the continuance of the party in custody, after a reasonsonable time, being a new trespass. *Davis v. Capper*, 10 *B. and C.* 28.

An action of trespass cannot be maintained against a judicial officer, as against the steward of a court baron, where his bailiff by mistake takes the goods of A. under a precept against B. *Holroyd v. Breare*, 2 *B. and A.* 473. Nor will trespass lie against the sheriff, for the act of his bailiff, under a judgment obtained in the county court. *Tinsley v. Nassau*, *M. and M.* 52.

Form of action with regard to private individuals.] If a party acts himself in apprehending another, he may be liable in trespass, but if he falsely and maliciously, and without any probable cause, puts the law in motion, *that* is properly the subject of an action on the case. *Per Bayley, J., Elsee v. Smith*, 1 *D. and R.* 103. If the warrant be illegal under which the party acted, he is liable in trespass, and in such an action, if the plaintiff's counsel open the case as an arrest upon an illegal warrant, the plaintiff is not bound to produce the warrant, but the defendant, if he relies upon it as a justification, must produce it. *Holroyd v. Doncaster*, 3 *Bingh.* 492. Where the defendant represented that the plaintiff was a fit person to be impressed, and in consequence he was impressed, though not a fit person, it was held that the defendant was liable in trespass. *Per Lord Ellenborough*, "This is not like a malicious prosecution, where the party gets a valid warrant, or writ, and gives it to an officer to be executed. There was clearly a trespass here in seizing the plaintiff, and the defendant therefore was a trespasser in procuring it to be done; nor is proof of malice necessary." *Flewster v. Royle*, 1 *Campb.* 187.

Proof of the imprisonment.] The circumstances which will

amount in law to an arrest or imprisonment are stated in another place. *Vide ante, p.* 387, *and post,* "*Actions against Constables.*"

Defence.

In actions against justices, constables, churchwardens, &c., the defendants may give any special justification in evidence under the general issue, 21 *Jac.* 1, *c.* 12, *s.* 2, *infra.* A private individual is not within the above statute, unless he is acting in aid of the constable. *Bond v. Rust,* 2 *C. and P.* 342. And unless he be within the statute, he must plead his justification especially, and must prove it as stated. Mere suspicion will not justify a private person in apprehending another on a charge of felony, though it is evidence in mitigation of damages under the general issue. *Adams v. Moore,* 2 *Selw. N. P.* 865, 4*th ed.* *Chinn v. Morris, R. and M.* 424, 2 *C. and P.* 361, *S. C.* *Cowles v. Dunbar,* 2 *C. and P.* 568, *and see Bingham v. Garnault,* 1 *Esp. Dig.* 337.

In an action of trespass against a sheriff who justifies under a writ of *ca. sa.,* if the plaintiff replies (admitting the writ, &c.) *de injuriâ absque residuo causæ,* he cannot under this replication give antecedent matter in evidence to render the subsequent arrest under the writ unlawful; and so also with regard to matter subsequent, making the defendant a trespasser *ab initio.* Such matters must be specially replied. *See Price v. Peek,* 1 *Bingh. N. C.* 387.

A constable who has reasonable ground for suspecting that a felony has been committed, or is about to be committed, is justified in arresting the party whom he suspects, but in order to justify a private individual in making the arrest, it is not enough to show a reasonable ground of suspicion, but he must prove that a felony has actually been committed. *Beckwith v. Philby,* 6 *B. and C.* 635. *Hedges v. Chapman,* 2 *Bingh.* 523. *Stonehouse v. Elliott,* 6 *T. R.* 315. *Ex parte Krans,* 1 *B. and C.* 261. *Nicholas v. Hardwick,* 5 *C. and P.* 495. Suspicion is no ground for arresting a man for a misdemeanor, without a magistrate's warrant. *Fox v. Gaunt,* 3 *B. and Ad.* 798. Nor is a magistrate at liberty to detain a person who is known, to answer a charge not yet made against him; he ought to have an information regularly before him, that he may be able to judge whether it charges any offence to which the party ought to answer. *R. v. Birnie,* 1 *Moo. and Rob.* 161.

By stat. 7 and 8 Geo. 4, c. 29, s. 63, any person found committing any offence punishable, either upon indictment or upon summary conviction, by virtue of that act, except only the offence of angling in the day-time, may be immediately apprehended, without a warrant, by any peace officer, or by the owner of the property on or with respect to which the offence shall be committed, or by his servant or any person authorised

by him, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law.

A private person may imprison another to prevent the committing of a felony. *Handcock v. Baker*, 2 *B. and P.* 260.

Where the plaintiff was in fact protected from arrest as a privileged person, it is a good defence to show that he did not insist on his privilege. *Pike v. Carter*, 3 *Bingh.* 84.

Witnesses.

Where in an action against three persons for false imprisonment, the plaintiff had connected all the defendants as joint trespassers, it was ruled that declarations made by one of the defendants after the imprisonment, and in the absence of the others, were admissible. *Wright v. Court*, 2 *C. and P.* 232. Where one person puts a party into the custody of another, what is said and done by that other is evidence against the person placing the party in custody, though said or done in his absence. *Per Garrow, B., Powell v. Hodgetts*, 2 *C. and P.* 433. But the declarations of one tort feazor are not evidence *for* the others. *Daniels v. Potter, M. and M.* 501.

TRESPASS TO PERSONAL PROPERTY.

The evidence for the plaintiff, in an action of trespass for taking away or injuring personal property, varies according to the nature of the issue joined between the parties.

Form of action, trespass, or case.] In cases of accidents occurring in driving carriages, steering ships, &c., questions have frequently arisen as to the proper form of action. The following distinctions may be drawn from the decisions on this subject. *See* 2 *H. Bl.* 442 (*n*), 4*th ed.*

1, Where the injury is both *wilful* and *immediate*, as where a person wilfully rows a boat against nets and destroys them; *Tripe v. Potter, cor. Yates, J., cited* 6 *T. R.* 191; trespass is the only form of remedy. *See Ogle v. Barnes*, 8 *T. R.* 192, *Moreton v. Hardern*, 4 *B. and C.* 227. *Williams v. Holland*, 10 *Bingh.* 112.

2, Where the injury is *immediate* but not *wilful*, occurring only by the *negligence* of the party; as where a man firing a gun without sufficient caution accidentally hurts another; *Weaver v. Ward, Hob.* 134, *Underwood v. Hewson*, 1 *Str.* 596; or where a person drives on the wrong side of the way in the dark and accidentally injures another carriage; *Leame v. Bray*, 3 *East*, 593; *Lotan v. Cross*, 2 *Campb.* 465; *Hopper v. Reeve*, 1 *B. Moore*, 407; or where a person, steering a ship, through ignorance or unskilfulness runs it against another; *Covell v.*

Laming, 1 *Campb.* 497; trespass *may* be maintained. But trespass is not the only form of remedy, for the party injured may, as it seems, waive the trespass and sue in case for the negligence. Thus, where the plaintiff declared that the defendants so incautiously, carelessly, negligently and inexpertly managed and steered their ship, that by reason of their negligence, &c., the ship sailed and ran foul of the ship of the plaintiff; after verdict for the plaintiff and motion in arrest of judgment, the court of King's Bench refused to arrest the judgment. *Ogle v. Barnes*, 8 *T. R.* 188. *Turner v. Hawkins*, 1 *B. and P.* 472. So where the declaration stated that the defendant took such bad care of his cart and horse in driving, that through his negligence, inattention, and want of care, &c., the cart struck the horse of the plaintiff with such force and violence, that the horse was much hurt, &c.; on demurrer, the court intimated a clear opinion, that, as the injury was expressly alleged in the declaration to have arisen from mere negligence, inattention, and want of care, the demurrer could not be sustained. *Rogers v. Imbleton*, 2 *Bos. and Pul. N. R.* 117, *recog. Moreton v. Hardern*, 4 *B. and C.* 227.

In Hall v. Pickard, 3 *Campb.* 187, it is said by Lord Ellenborough, "that it may be worthy of consideration, whether in those instances where trespass may be maintained, the party may not waive the trespass and proceed for the tort." In an action on the case against several persons as owners of a coach, for carelessly and negligently driving their coach, by their servant, &c., it appeared that at the time of the accident one of the defendants was himself driving, and it was insisted that the action ought therefore to have been in trespass, and not in case, but the court of King's Bench held the action to be rightly brought, for that the plaintiff had a right to sue all the defendants, and that trespass could not have been maintained against them all. Bayley, J., said, in reference to *Leame v. Bray*, that the court there did not decide that an action on the case would have been improper; "No doubt," his Lordship said, "trespass lies when an injury is inflicted by the wilful act of the defendant, but it is also clear that case will lie when the act is negligent and not wilful." Holroyd, J., said, "In cases where there is no ground of action, except trespass, perhaps case will not lie, but where an actual damage has been sustained, the trespass may be waived, and an action is maintainable on the special circumstances of the case." Littledale, J., said, "Here the defendant Hardern may at the moment have done all in his power to avoid the accident, but may have been unable to do so in consequence of antecedent negligence, and it being found that the plaintiff sustained the injury, in consequence of his careless driving, that sustains the present form of action." *Moreton v. Hardern*, 4 *B. and C.* 223. *See also Branscomb v. Bridges*, 1 *B. and C.* 145. *Smith v.*

Goodwin, 4 *B. and Ad.* 413, 1 *N. and M.* 371, *S. C.* 4 *B. and Ad.* 458, 466.

According to the above doctrine, it was held by the court of Common Pleas that in a case of accident from driving, where the injury is caused by negligence, case may be maintained, though it be *immediate*, provided it be not wilful. *Williams v. Holland*, 10 *Bingh.* 112, 3 *Moore and S.* 540, *S. C.*

3, Where the injury is not *immediate*, but *consequential*, trespass will not lie, and case is the proper remedy. "In all the books the invariable principle to be collected is, that where the injury is immediate on the act done, there trespass lies, but where it is not immediate on the act done, but consequential, then the remedy is in case." *Per Le Blanc, J., Leame v. Bray*, 3 *East*, 593. *Covell v. Laming*, 1 *Campb.* 498. *Day v. Edwards*, 5 *T. R.* 649.

4, Where the act arises by the negligence of the defendant's servants, trespass cannot be maintained, and case is the only remedy. *Morley v. Gaisford*, 2 *H. Bl.* 442. *Huggett v. Montgomery*, 2 *Bos. and Pul. N. R.* 446. 4 *B. and C.* 227. Though if the master and servant are sitting together, and the servant is driving the master, the act of the servant is the act of the master, and the *trespass* of the servant is the trespass of the master. *Chandler v. Broughton*, 1 *Crom. and M.* 29, 3 *Tyr.* 220, *S. C.*

5, Where the property injured is not in the immediate possession of the owner, but has been let to hire, the owner must bring case, and cannot maintain trespass, for it is in the nature of an injury to his reversion. *Hall v. Pickard*, 3 *Campb.* 187. But the mere gratuitous bailing of the property to another, does not take it out of the possession of the owner, so as to prevent him from maintaining trespass. *Lotan v. Cross*, 2 *Campb.* 464.

Evidence under the general issue.] By the rules of H. T. 4 W. 4, in actions of trespass, *de bonis asportatis*, the plea of not guilty shall operate as a denial of the defendant having committed the trespass alleged, by taking or damaging the goods mentioned, but not of the plaintiff's property therein.

The landlord of a furnished house cannot maintain trespass against the sheriff for taking the goods in execution. *Ward v. Macauley*, 4 *T. R.* 489. But it is sufficient if the plaintiff at the time the act was done had the *constructive* possession of the chattels; thus a person who has the right of property may maintain trespass, though not actually in possession, for the right of property draws to it the right of possession. Therefore where goods are taken, after the owner's death, and before probate granted to his executor, the latter, after probate granted, may maintain trespass. *Com. Dig. Tres.* (*B.* 4), *Smith v. Milles*, 1 *T. R.* 480. *Dunwich v. Sterry*, 1 *B. and Ad.* 831. So the

lord of a manor may maintain trespass for an estray or wreck, before seizure. *Ibid.* So a person who has leased his land for years, without any reservation of the timber, may have trespass *de bonis asportatis*, during the continuance of the term, against a third person, who wrongfully cuts down the timber, and after it is severed carries it away. *Ward v. Andrews*, 2 *Chitty*, 636. But the *lessee* cannot maintain such an action. *Evans v. Evans*, 2 *Campb.* 491. So if the owner of a chattel gratuitously permit another to use it, he may maintain trespass for an injury done to it while it is so used. *Lotan v. Cross*, 2 *Campb.* 464. But it is otherwise where the chattel is let to him; thus where the plaintiff hired a chariot for the day, and appointed the coachman and furnished the horses, it was held that *he* was properly described as the proprietor and owner of the chariot. *Croft v. Alison*, 4 *B. and A.* 590.

The master of a fly-boat belonging to a canal company, paid by weekly wages, may have trespass for an injury to the boat. *Moore v. Robinson*, 2 *B. and Ad.* 817.

The plaintiff must show an act amounting to a trespass on the part of the defendant. Thus where a sheriff seizes goods after a secret act of bankruptcy by the owner, upon which a commission subsequently issues, the sheriff cannot be made a trespasser by relation, and trover, and not trespass, is the proper remedy. *Cooper v. Chitty*, 1 *Burr.* 20. *Smith v. Milles*, 1 *T. R.* 475. *Balme v. Hutton*, 9 *Bingh.* 471, *post.* If a man employs an officer who seizes the goods of a third person, and the party employing the officer is present at the seizure, he is liable in trespass. *Meredith v. Flaxman*, 5 *C. and P.* 99.

Throwing down and breaking a jar has been held to be a sufficient asportation and conversion of a chattel to entitle the plaintiff to full costs. *Gosson v. Graham*, 1 *Stark.* 55.

Defence.

Evidence under the general issue.] Under the general issue the defendant might formerly show that the goods in question were not the property of the plaintiff. Thus in an action against a sheriff for taking the plaintiff's goods, the defendant might show, under the general issue, that the plaintiff derived title to the goods under a bill of sale, fraudulent as against creditors, and that the defendant took them under a judgment and execution against the real owner. *Martin v. Podger*, 2 *W. Bl.* 701, *see Luke v. Billers*, 1 *Ld. Raym.* 733. But this is altered by the rules of H. T. 4 W. 4, (*ante, p.* 478), under which it has been held that the defendant cannot, even under a plea that the plaintiff was not possessed, show that the plaintiff took under a fraudulent sale. *Howell v. White*, 1 *Mov. and Rob.* 400. Where the sheriff justified taking the plaintiff's own goods under a writ of execution, such justification, even before

the new rules, must have been specially pleaded; for the property of the goods continues in the plaintiff till execution executed, and the sheriff therefore cannot show that when he took them they were not the plaintiff's goods. *B. N. P.* 91. *See post in "Actions against Sheriffs."* So the defendant could not justify, under the general issue, the cutting the posts and rails of the plaintiff, though put upon the defendant's soil. *Welsh v. Nash*, 8 *East*, 394. But where the defendant was a pound-keeper, and merely received into his pound the cattle, taken by others, it was held that he was not even *primâ facie* a trespasser, and that he might give his defence in evidence under the general issue. *Badkin v. Powel*, *Cowper*, 476. Although, in trespass for taking goods, as a distress for rent, the defendant may give his justification in evidence under the general issue, by stat. 11 G. 2, c. 19, s. 21, yet where the goods have been clandestinely *removed from the premises*, and afterwards seized by the defendant, the defence must be specially pleaded. *Vaughan v. Davis*, 1 *Esp.* 256. *Furneaux v. Fotherby*, 4 *Campb.* 136.

In trespass for destroying a picture, the defendant may show, in mitigation of damages, that it was a scandalous libel, and the plaintiff shall only recover the value of the canvass and paint. *Du Bost v. Beresford*, 2 *Campb.* 511.

Evidence on plea of justification under legal process.] Where in trespass for taking goods, the defendant justifies under a *fi. fa.* and the plaintiff replies, admitting the writ *absque residuo causæ*, he may show that the acts of the defendant were not done really under or in execution of the writ, but for another purpose, and under another claim, and that the writ and the proceedings under it were a mere contrivance to get possession of the goods. *Lucas v. Nockells*, *D. P.* 10 *Bingh.* 157.

TRESPASS QUARE CLAUSUM FREGIT.

By the rules of H. T. 4 W. 4, in actions of trespass *quare clausum fregit*, the plea of not guilty shall operate as a denial that the defendant committed the trespass alleged, in the place mentioned, but not as a denial of the plaintiff's possession, or right of possession of that place, which, if intended to be denied, must be traversed specially. Under this plea, therefore, the plaintiff will only have to prove the trespass committed in the place mentioned. Where a justification or other special plea is pleaded, the evidence varies according to the nature of the issue joined between the parties.

Evidence of possession.] In order to maintain this action, the plaintiff ought to have had possession, actual or constructive.

Topham v. Dent, 6 *Bingh*. 516. And must prove the same, if denied on the pleadings. Any possession is a legal possession as against a wrong-doer. *Graham v. Peat*, 1 *East*, 246. *Catteris v. Couper*, 4 *Taunt*. 547. *Dyson v. Collick*, 5 *B. and A.* 603. *Oughton v. Seppings*, 1 *B. and Ad.* 241. Thus a person occupying crown lands, under a parol license, has such a possession as entitles him to maintain trespass against a wrong-doer. *Harper v. Charlesworth*, 4 *B. and C.* 574. So if a tenant holds over, after the expiration of his lease, or incurs a forfeiture by committing waste or otherwise, yet if the landlord permits him to continue in actual possession, he may maintain trespass against any person entering upon him, and not having a better title than himself. *Per Littledale, J., ibid.* 594. *Com. Dig. Trespass* (*B.* 1). But commissioners of sewers under the statute 23 H. 8, c. 5, have not such a possession in their works, as will enable them to maintain trespass for breaking down a wall, or dam, erected by them across a navigable river. *Duke of Newcastle v. Clark*, 8 *Taunt*. 602. Such commissioners have merely a right to enter upon the *locus in quo*, for the purpose of doing certain acts. *Dyson v. Collick*, 5 *B. and A.* 603. So the persons who by 16 and 17 Car. 2. are authorised to make navigable certain rivers, have no interest in the soil of a bank, formed of the earth excavated from the channel of a river, so as to entitle them to maintain trespass *quare clausum fregit* for an injury to such bank. *Hollis v. Goldfinch*, 1 *B. and C.* 205. But where certain private individuals contracted with the proprietors of a navigation to form a canal, and erected a dam of earth and wood upon a close, with the permission of the owner, for the purpose of completing their work, it was held that they had a sufficient possession to support trespass against a wrong-doer. *Dyson v. Collick*, 5 *B. and A.* 603.

Where a party has an interest in the soil, it is not in all cases necessary that he should have an exclusive possession. Thus the owner of the soil of a street, dedicated to the public, may maintain trespass for an injury to the soil; *Lade v. Shepherd*, 2 *Str*. 1004; and so also with regard to the owner of a market. *Mayor of Northampton v. Ward*, 1 *Wils*. 107.

It is not necessary that a person who enters upon land should declare that he enters to take possession, it is sufficient if he does any act to show his intention. His servants ploughing the land will be evidence of possession. *Butcher v. Butcher*, 7 *B. and C.* 399, 1 *M. and R.* 220, *S. C.* The occasional possession of the key of a chapel, with license to preach there, is not sufficient to maintain trespass. *Revett v. Brown*, 5 *Bingh*. 7.

Evidence of possession—property, or interest in the soil, not necessary.] Exclusive possession, without property or interest

in the soil, is sufficient to maintain this action. Thus one who has the herbage; *Co. Litt.* 4 *b. Weldon v. Bridgwater, Cro. Eliz.* 421, *Vin. Ab.* (*Trespass*); or the vesture or pasture of a close; *Co. Litt.* 4 *b. B. N. P.* 85, *Wilson v. Mackreth*, 3 *Burr.* 1827, *Parker v. Staniland*, 11 *East*, 366, *Evans v. Roberts*, 5 *B. and C.* 837; may maintain trespass. So a person entitled to the exclusive enjoyment of a crop growing on land, during the proper period of its full growth, and until it be cut and carried away, may, in respect of such exclusive possession, maintain trespass. *Per Lord Ellenborough, Crosby v. Wadsworth*, 6 *East*, 609. *Tomkinson v. Russell*, 9 *Price*, 287. So where a person has an exclusive right of digging turves; *Wilson v. Mackreth*, 3 *Burr.* 1824; or a grant of underwood. *Hoe v. Taylor, Cro. Eliz.* 413. So the owner of a free warren. *F. N. B.* 86, *M. Com. Dig. Trespass*, (*A.* 2). *Lord Dacre v. Tebb*, 2 *W. Bl.* 1151. *Smith v. Kemp*, 2 *Salk.* 637; *but see Weldon v. Bridgwater, Cro. Eliz.* 421. And where a meadow is divided annually amongst certain persons by lot, after their several portions are allotted, each has an exclusive possession, and may maintain trespass. *Weldon v. Bridgwater, Cro. Eliz.* 421. *Co. Litt.* 4, *a.* 48, *b.* 5 *East*, 481. 13 *East*, 159. 1 *B. and C.* 389. A copyholder has such a possession of the mines under his land, as to maintain trespass for taking coals, though there is no injury to the surface. *Lewis v. Branthwaite*, 2 *B. and Adol.* 437.

Evidence of possession—immediate.] It must appear that the plaintiff was in the actual and immediate possession of the *locus in quo* when the trespass was committed. Therefore an heir before entry, who has only a seisin in law, cannot maintain trespass. *Com. Dig. Trespass* (*B.* 3). So a bargainee before entry. *Ibid. Barker v. Keat*, 2 *Mod.* 251. *Geary v. Bearcroft, Cart.* 66; *but see Anon. Cro. Eliz.* 46. So neither the conusee of a fine; *Berry v. Goodman*, 2 *Leon.* 147, *Arg.*; a devisee; *Anon.* 2 *Mod.* 7, *Geary v. Bearcroft, Bridgm. Judgm.* 495; a surrenderee; *Br. Ab. Surr.* 50; a reversioner after the expiration of an estate for life or years; *Keilw.* 163, *a. Com. Dig. Tresp.* (*B.* 3); nor a lessee for years; *Keilw.* 163, *a. Bac. Ab. Leases, M.*; can bring trespass before entry. So a parson before induction. *Plowd.* 528. But after induction he may maintain trespass for an injury to the glebe-lands, although he has not made an actual entry upon the part on which the trespass was committed, for the act of induction puts him into possession of part for the whole. *Bulwer v. Bulwer*, 2 *B. and A.* 470. On the determination of a lease at will by the death of the lessee, the lessor may maintain trespass before entry. *Co. Litt.* 62, *b. Geary v. Bearcroft*, 1 *Lev.* 202. And there are authorities to show that where land is let at will, and a trespass is done to the land, both the lessor and lessee may maintain trespass.

Per Holroyd, J., Harper v. Charlesworth, 4 *B. and C.* 583, *see* 2 *Rol. Ab.* 551, *l.* 49. *Com. Dig. Tresp.* (*B.* 2). *Bridgm. Judgm* 496 (*n*). If a lessee at will commits voluntary waste, the lessor may immediately maintain trespass against him, for the committing waste amounts to a determination of the will. *Lady Shrewsbury's case,* 5 *Rep.* 13, *b. Co. Litt.* 57, *a.* Where trees are excepted in a lease, the lessor may maintain trespass *quare clausum fregit* against any one who cuts them down, for by the exception of the trees the land on which they grow is excepted also. *Br. Ab. Tresp.* 55. *Ashmead v. Rangor,* 1 *Ld. Raym.* 552. Actual possession at the time of the trespass done is sufficient; it is not necessary that the plaintiff should be in possession at the time of action brought. 2 *Rol. Ab.* 569. *l.* 20.

Evidence of possession by relation.] Although to maintain this action the plaintiff must have had the immediate possession at the time of the injury, yet there are some cases in which, by the doctrine of relation, the plaintiff is allowed to recover for trespasses committed at a period when he was not in fact in possession. Thus a disseisee, who re-entered, revested the possession in himself *ab initio,* and might have had trespass against the disseisor or a stranger, for any act of trespass committed between the disseisin and the re-entry; 2 *Rol. Ab.* 550, *l.* 7. 554, *l.* 39. *Co. Lit.* 257, *a;* but where a fine had been levied with proclamations, the re-entry of the party did not revest the possession by relation *ab initio. Compere v. Hicks,* 7 *T. R.* 727. *Hughes v. Thomas,* 13 *East,* 486. These instances are mentioned by way of illustration of the doctrine, disseisin and fines being now abolished. *Vide ante, p.* 441.

Evidence of the ownership of wastes, rivers, walls, ditches, &c.] The waste land adjoining to a public highway is presumed, in the first instance, to belong to the owner of the adjoining land, as the highway itself *usque ad filum* does, and not to the lord of the manor. *Steel v. Prickett,* 2 *Stark.* 468. And this rule is the same whether the adjoining land be freehold or copyhold. *Doe v. Pearsey,* 7 *B. and C.* 304. *Doe v. Kemp,* 7 *Bingh.* 332. *Cooke v. Green,* 11 *Price,* 736. The presumption is to be confined to that extent, and if the narrow strip be contiguous to, or communicate with open commons or larger portions of land, the presumption is either rebutted or considerably narrowed, for the evidence of ownership which applies to the larger portions, applies also to the narrow strip which communicates with them. *Grose v. West,* 7 *Taunt.* 41. *Headlam v. Hedley, Holt,* 463. Where a road through common land is set out by commissioners under an inclosure act, it seems doubtful whether the usual presumption as to the right of the owners of the adjoining lands applies. *R. v. Edmonton,* 1 *Moo.*

and R. 32. *See also Rex v. Wright,* 3 *B. and Ad.* 681. The cutting down trees in a way, or clearing it, is evidence to prove the right of soil of the way. *See Berry v. Goodman,* 2 *Leon.* 148. *Vin. Ab. Evid.* (*T. b.* 102.)

Fresh rivers, of common right, belong to the owners of the soil adjacent, so that the owners of the one side have, of common right, the property of the soil, and consequently the right of fishing *usque ad filum aquæ*, and the owners of the other side the right of soil or ownership, and fishing to the *filum aquæ* on their side. If a man is owner of the land on both sides, by common presumption he is owner of the whole river. *Hale de jure maris; Harg. Law Tracts,* 5. Where two parishes are separated by a river, the *medium filum* is the presumptive boundary between them. *Rex v. Landulph,* 1 *Moo. and Rob.* 393.

A wall differs in point of ownership from a bank, being an artificial edifice, not formed from the materials of the place where it stands, and the property therefore of such wall is said to be in him who is bound to repair it, while the property in a bank follows that of the soil from which it is constructed. *Callis on Sewers,* 74, 4*th ed.; see D. of Newcastle v. Clark,* 8 *Taunt.* 602. Where A. licensed B. to build a bridge on his land, and B. covenanted to build the bridge for the public use and to repair it, it was held that the property in the materials of the bridge, when built and dedicated to the public, continued in B., subject to the right of passage by the public, and that when severed and taken away by a wrong-doer, B. might maintain trespass for the asportation. *Harrison v. Parker.* 6 *East,* 154, *see Spooner v. Brewster,* 3 *Bingh.* 139. If two tenants in severalty build a party wall, one half of the thickness of which stands on the land of each, which is contributed by each under the building act, 14 G. 3, c. 78; the wall ensues the nature of the land, and the owners of the lands are not tenants in common of the wall. *Matts v. Hawkins,* 5 *Taunt.* 20. But in a case to which the building act does not apply, the common user of a wall, separating adjoining lands belonging to different owners, is *primâ facie* evidence that the wall and the land on which it stands belong to the owners of the adjoining lands in equal moieties as tenants in common. *Cubitt v. Porter,* 8 *B. and C.* 257.

The rule with regard to the ownership of hedges and ditches has been differently laid down by different judges. Where two adjacent fields, says Mr. Justice Bayley, are separated by a hedge and ditch, the hedge *primâ facie* belongs to the owner of the field in which the ditch is not. If there are two ditches, one on each side of the hedge, then the ownership of the hedge must be ascertained by proving acts of ownership. *Guy v. West,* 2 *Selw. N. P.* 1218. The rule with regard to ditching, says Mr. Justice Lawrence, is this: no man making a ditch can cut into his neighbour's soil, but usually he cuts to the

very extremity of his own land; he is of course bound to throw the soil, which he digs out, upon his own land, and after, if he likes it, he plants a hedge upon the top of it; therefore if he afterwards cuts beyond the edge of the ditch, he cuts into his neighbour's land, and is a trespasser; no rule about four feet and eight feet has any thing to do with it. *Vowles v. Miller*, 3 *Taunt*, 138. The land which constitutes the ditch, in point of law, is part of the close, although it be on the outside of the bank. *Per Holroyd, J., Doe v. Pearsey*, 7 *B. and C.* 308. Where lands abutting on a ditch and a lane on each side belong to different owners, the presumption is, that a hedge and ditch on one side, both belong to the occupier of the land on that side. *Per Bayley, J., Noye v. Reed*, 1 *Mann and Ry.* 65.

It is said that if A. plants a tree at the extreme limits of his own land, and the tree growing, extends its roots into the land of B., A. and B. are tenants in common of the tree; but if all the roots grow in A.'s land, though the boughs shadow the land of B., the property is in A. *Per Holt, C. J., Waterman v. Soper*, 1 *Ld. Raym.* 737. *B. N. P.* 85. 2 *Rol. Rep.* 255. But according to another authority, if a tree grows in A.'s close, and roots in B.'s, yet the body of the main part of the tree being in the soil of A., all the residue of the tree belongs to him. *Masters v. Pollie*, 2 *Rol. Rep.* 141. In a late case, *Littledale, J.*, ruled, that the tree belongs to him in whose soil it was first sown or planted. *Holder v. Coates, M. and M.* 112. The property in *trees* has been held to be in the *landlord*, the property in bushes, even where they have been cut down by a stranger, in the tenant. *Berriman v. Peacock*, 9 *Bingh.* 384.

Evidence of the locality of the premises.] The venue in this action is local, and therefore trespass will not lie for breaking and entering a house in Canada. *Doulson v. Matthews*, 4 *T. R.* 503. It was formerly not necessary to name, or to specify the abuttals of the *locus in quo*, but now, by the rules of H. 4 W. 4, the close or place in which, &c. must be designated in the declaration, by names or abuttals or other description, in failure whereof, the defendant may demur specially. Where the close is so named or described by its abuttals, a material variance will be fatal. Thus, if the description be "on the south side, abutting on the mill of A.," the plaintiff must prove a mill there in the tenure of A., but it will be sufficient, though there be a highway between them. 2 *Rol. Ab.* 678, *l.* 10. *B. N. P.* 89. *Gilb. Ev.* 237. Extreme strictness, however, is not observed in the proof of abuttals; thus, if a close be described as abutting towards the east, but it proves to be north inclining to east, the proof is sufficient. 2 *Rol. Ab.* 678, *l.* 13. *Roberts v. Karr*, 1 *Taunt.* 501. Where the close was described as abutting in the direction of the four cardinal points *towards*

certain closes, and it appeared that it was a *triangular* close abutting towards such closes, it was held to be within the description. *Lempriere v. Humphry*, 4 *Nev. and M.* 636. It is not very clear whether the objection to the abuttals can now be taken under the plea of not guilty, or whether the defendant must plead that the plaintiff is not in possession. *Ibid.* Where the close is stated to be situated in a certain parish, the proof must correspond with the statement. *Taylor v. Hooman*, 1 *B. Moore*, 161. If it is stated to be in the parish of A., it is enough if A. has a church and overseers of its own, although, perhaps, strictly speaking, it may only be a hamlet; in such an action the court will not try a question of parochiality. *Anon.* 2 *Campb.* 4.

Evidence of trespass committed by defendant.] Trespass lies against the party who did the trespass, and all aiding him; *Com. Dig. Tresp.* (*C.*1); and a person may become a trespasser by previous command, or where the trespass has been committed for his use and benefit, by subsequent assent. *Barker v. Braham*, 3 *Wils.* 377. But in cases of subsequent assent, it must appear that the trespass was for his benefit. *Wilson v. Barker*, 4 *B. and Adol.* 614, 1 *N. and M.* 409, *S. C.* A person who sends out his hounds and his servants, and invites others to hunt with him, though he does not himself accompany them, upon the plaintiff's land, is answerable for the trespass committed by them to the extent of the damage done by them. *Baker v. Berkeley*, 3 *C. and P.* 32. But a feme covert and an infant cannot make themselves trespassers, either by prior command or subsequent assent. *Co. Litt.* 180, *b. note* (4), 357, *b.* A master is not liable for the wilful trespass of his servant. 2 *Rol. Ab.* 553, *l.* 25. *See Chandler v. Broughton*, 1 *Crom. and M.* 29. But where he orders his servant to do an act, the natural consequence of which is a trespass, and the servant uses ordinary care in the execution of the order, the master is liable, though he directs the servant to avoid the trespass. *Gregory v. Piper*, 9 *B. and C.* 591. A party is liable for the acts of his attorney, on proof of the retainer, as in the following case: A. employed B. an attorney to enforce payment of a debt. B. directed his agent to sue out a *justicies* in the county court. Before the return of the *justicies*, the debtor paid the debt and costs to B. His agent, not knowing of such payment, afterwards entered up judgment in the county court, although the defendant had not appeared, and sued out execution, under which the goods of the debtor were seized; it was held that both A. and B. were liable as trespassers. *Bates v. Pilling*, 6 *B. and C.* 38; *see also Crook v. Wright*, *R. and M.* 278. The owner of animals *mansuetæ naturæ* is liable for trespasses committed by them in the land of another; *Keilw.* 3 *b. Com. Dig. Tresp.* (*C*); but a person from whose land animals *feræ naturæ*, as rabbits, &c.

escape, is not liable for an injury done by them. *Boulston's case*, 5 *Rep*. 104, *b*. *Cooper v. Marshall*, 1 *Burr*. 259. *and see Mason v. Keeling*, 1 *Ld. Raym*. 608. *Latch*, 13. *Beckwith v. Shordike*, 4 *Burr*. 2093.

Where the defendant enters, &c. under an authority in law, the plaintiff may show that he has abused such authority, and so become a trespasser *ab initio*, but a mere non-feasance will not be such an abuse. *Six Carpenters' case*, 8 *Rep*. 146, *a*. A lessor who enters to view waste and does damage, or stays all night, a commoner who enters to view his cattle, and cuts down a tree, a man who enters a tavern and continues there all night against the will of the landlord, are all trespassers *ab initio*. *Com. Dig. Tresp*. (*C*. 2). So an officer who neglects to remove goods attached, within a reasonable time, and continues in possession. *Reed v. Harrison*, 2 *W. Bl*. 1218. *Aitkenhead v. Blades*, 5 *Taunt*. 198. A person distraining who remains in possession above the five days, and disturbs the party, is a trespasser for the period only during which he remains in possession, after the five days expired. *Winterbourne v. Morgan*, 11 *East*, 395, *per Le Blanc and Bayley, J. J.*, *Messing v. Kemble*, 2 *Campb*. 115. And a tenant tendering his rent after distress, but before impounding, may maintain trespass for a subsequent removal of the distress. *Vertue v. Beasley*, 1 *Moo. and Rob*. 21. The abuse of an authority *in fact* will not in general render the party a trespasser *ab initio*. *Six Carpenters' case*, 8 *Rep*. 146, *b*. As to the replication of abuse, *vide post*.

By the statute 6 Anne, c. 18, guardians, trustees, husbands seised in right of their wives, and tenants *pur autre vie*, holding over without consent, are declared trespassers, but the act does not extend to tenants for years. *B. N. P*. 85.

Evidence under alia enormia, and in aggravation of damages.] In trespass for breaking and entering the plaintiff's house, evidence that the defendant also debauched the plaintiff's daughter has been allowed under *alia enormia*. *Per Holt, C. J.*, *Russell v. Corn*, 6 *Mod*. 127, *cases temp. Holt*, 699. *Sippora v. Basset*, 1 *Sid*. 225. *B. N. P*. 89. But it is said to be the safest and most convenient rule not to admit, under this general averment, proof of such facts as the debauching of a daughter, which are entirely unconnected in their nature, and distinct from the substantive ground of the action (the trespass in entering the house), though in point of time, the one may have immediately followed the other. 2 *Phill. Evid*. 185; *see ante, p*. 472. In trespass for breaking and entering the house of the plaintiff, he may be allowed to give in evidence, that his wife was so terrified by the conduct of the defendant, that she was immediately taken ill, and soon afterwards died; but this evidence was held admissible only for the purpose of

showing how outrageous and violent the trespass was, and not as a substantive ground of damage. *Huxley v. Berg*, 1 *Stark.* 98. So where the plaintiff declared against the defendant for breaking and entering her house, and under a false charge that the plaintiff had stolen property in her house, ransacking and searching, &c. whereby she was injured in her credit, it was held that the declaration was good, and that the jury might give damages for the trespass, as aggravated by the false charge. *Bracegirdle v. Orford*, 2 *Maule and S.* 77. The jury may consider not only the mere pecuniary damage sustained by the plaintiff, but also the intention with which the fact has been done, whether for insult or injury. *Per Abbott, J., Sears v. Lyons*, 2 *Stark.* 318. *Merest v. Harvey*, 1 *Marsh.* 139.

Evidence under the general issue.] Under the general issue the defendant might formerly have given evidence of title in himself. *Dodd v. Kyffin*, 7 *T. R.* 354. *Argent v. Durrant*, 8 *T. R.* 403. *Turner v. Meymott*, 1 *Bingh.* 158. So he might have proved that the freehold and right of possession were in a third person, by whose command he entered. *Diersley's case*, 1 *Leon.* 301. 8 *T. R.* 403. *Gilb. Evid.* 255. The command must have been proved; *Davies v. Lorimer*, *Lanc. Spring Ass.* 1824; but it has been ruled that the declarations of the owner, made after the trespass, are inadmissible to prove the command. *Carr v. Fletcher*, 2 *Stark.* 71. The defendant might also have shown under the general issue, that he was tenant in common with the plaintiff, or that a third person, by whose command he entered, was tenant in common with the plaintiff. *Ross's case*, 3 *Leon.* 83. *Gilb. Ev.* 235. But where the subject matter which was held in common has been destroyed, tenancy in common is no defence, as where one tenant in common grubs up and destroys a hedge. *Voyce v. Voyce*, *Gow*, 201. All these defences must now, by the rules of H. 4 W. 4, be specially pleaded.

So every matter of justification or excuse must be pleaded specially, as a right of common; *Co. Litt.* 283, *a*; a right of way or easement; *Vin. Ab. Ev.* (*Z. a.*) *Gilb. Ev.* 251; defect of fences; *Co. Litt.* 283, *a*; a license; *Gilb. Ev.* 249; an authority in law; *Com. Dig. Pleader*, (3 *M.* 35); and so of all matters in discharge of the action, as accord and satisfaction. *Bird v. Randall*, 3 *Burr.* 1353. But by various statutes particular persons are enabled to give the special matter in evidence under the general issue; parties distraining for rent arrear by 11 G. 2, c. 19, s. 21, justices of the peace, mayors, constables, &c. by 7 Jac. 1, c. 5, churchwardens and overseers by 21 Jac. 1, c. 12, and these statutes are not affected by the new rules.

Under the general issue the defendant could not, even before

the new rules, have proved as a bar that the plaintiff is jointenant, or tenant in common of the *locus in quo* with a third person, which is matter of plea in abatement. *Brown v. Hedges*, 1 *Salk.* 290. *B. N. P.* 91. *Gilb. Ev.* 234. But he may give such evidence in order to reduce the plaintiff's damages *pro tanto. Nelthorpe v. Dorrington*, 2 *Lev.* 113, *B. N. P.* 35. So he may show other circumstances which he could not have pleaded in justification, as in trespass for cutting trees, that they were applied to purposes for which the plaintiff had covenanted to furnish timber. *Rennell v. Wither, Manning's Index*, 291, 2*d ed.*

Evidence on the plea of liberum tenementum.] Where the defendant pleads *liberum tenementum*, that the *locus in quo* is his soil and freehold, or the soil and freehold of a third person, by whose command he entered, the issue is upon him, and he must prove it either by direct evidence of title, or by the presumptive evidence of title arising from acts of ownership, &c. Where the plaintiff has declared generally for a trespass to his close in A. without naming the close, and the defendant has pleaded *lib. ten.* upon which the plaintiff has taken issue, it will be sufficient for the defendant to prove a freehold in himself, any where in A., which will entitle him to a verdict. *Helwis v. Lamb*, 2 *Salk.* 453. *Goodright v. Rich*, 7 *T. R.* 335. 1 *Saund.* 299, *b* (*n*). The plaintiff in such case should have new assigned, setting out the name or abuttals of the *locus in quo*. But if the plaintiff names the real name of the close in his declaration, and the defendant pleads *lib. ten.* generally, without setting out the abuttals of the close, upon which issue is joined, the plaintiff may recover on proving a trespass done to a close in his possession, bearing the name stated in the declaration, though the defendant may have a close in the same parish known by the same name; and it will not therefore be necessary for the plaintiff to new assign. *Cocker v. Crompton*, 1 *B. and C.* 489. *Cooke v. Jackson*, 9 *D. and R.* 495. And where the close is described by *abuttals*, it is the same as where it is described by name. *Lempriere v. Humphrey*, 4 *Nev. and M.* 638.

Evidence under plea of justification generally.] Where to a plea of justification the plaintiff has replied *de injuriâ suâ propriâ absque tali causâ*, the whole matter of the plea is put in issue, and must be proved, so far as it is material to constitute a justification. The plaintiff declared for breaking and entering his dwelling-house, assaulting and imprisoning him, and during his imprisonment assaulting, striking, and pushing him in a violent manner, and the defendant pleaded a justification under a writ and warrant, under which he entered, &c. and arrested, &c., and because the plaintiff, after he had been

so taken into custody under and by virtue of the said writ and warrant, behaved and conducted himself in a violent and outrageous manner, and could not otherwise be kept in a safe and proper manner, the defendant was obliged to push and pull about the plaintiff, &c. and to give him a few blows, &c. A battery during the imprisonment was proved, but the defendant, though he proved the arrest, gave no evidence of outrageous conduct by the plaintiff while in custody, and it was held that the plea was not proved, and that a new assignment was not necessary. *Phillips v. Howgate*, 5 *B. and A.* 220. *Reece v. Taylor*, 4 *Nev. and M.* 469. *Timothy v. Simpson*, 1 *Crom. M. and R.* 757. But where the plea consists of two facts, either of which, if separately pleaded, amounts to a good defence, it will be sufficient for the defendant to prove either of those facts. *Spilsbury v. Micklethwaite*, 1 *Taunt.* 146. It is sufficient to prove so much of the plea as covers the declaration, and other matters alleged in the plea, unnecessarily, need not be proved. *Atkinson v. Warne*, 1 *Crom. M. and R.* 827. And it is sufficient to prove a justification which covers the trespass, although it does not cover the matter of aggravation. Thus, where the plaintiff declares for breaking, entering, and *expelling*, and the defendant justifies only the breaking and entering, it is sufficient, for the breaking and entering are the gist of the action, and the expulsion is only matter of aggravation; if the plaintiff had wished to take the advantage of the expulsion, he should have shown the special matter in a new assignment. *Taylor v. Cole*, 3 *T. R.* 292, 1 *H. Bl.* 555, *S. C.* So where to trespass for breaking and entering a house, and staying therein three weeks, the defendant pleaded a justification, as to breaking and entering, and staying in the house twenty-four hours, and it was proved that he stayed in the house more than twenty-four hours, Lord Ellenborough held that the justification was proved, and that if the plaintiff meant to rely upon the excess beyond the twenty-four hours, he ought to have said so by a new assignment. *Monprivatt v. Smith*, 2 *Campb.* 175; *see also Lambert v. Hodgson*, 1 *Bingh.* 317, 1 *Saund.* 28, *a* (*n*). The plaintiff declared in trespass for breaking his close, and set out the close by abuttals. The defendant justified, alleging that the said close in which, &c. was part of an allotment of six acres made by commissioners duly authorised for certain purposes, in execution of which he entered. The plaintiff replied that the said close in which, &c. was not part of the six acres in the plea supposed to have been allotted, and thereupon issue was joined. It appeared that the close set out by abuttals was not all within the allotment, but that the part in which the actual trespass was committed was within it; it was held that the justification was made out by this evidence. *Basset v. Mitchell*, 2 *B. and Adol.* 99.

Evidence on plea of right of way.] The cases in which the grant of a way, *ante, p.* 19, and the dedication of a way to the public, *ante, p.* 20, will be presumed, have been already stated. If the defendant plead a right of way, and the plaintiff deny the right, the latter may give in evidence that the way has been stopped by order of two justices; but the order must pursue the form prescribed by statute, and any material variance will be fatal. *Davison v. Gill*, 1 *East*, 64. *Welsh v. Nash*, 8 *East*, 394. *De Ponthieu v. Pennyfeather*, 5 *Taunt*. 634. On the traverse of a prescriptive right of way, the defendant may prove that the way was extinguished by unity of possession. *Whalley v. Tompson*, 1 *B. and P.* 371. Under a traverse of the right of way the plaintiff will not be allowed to show that the trespass committed by the defendant was not covered by the supposed right of way. Thus, where the defendant pleaded that he was seised in his demesne as of fee of a messuage, &c. in the parish, and that he and all those whose estate, &c. had a right of way for himself, &c. his and their farmers and tenants, occupiers of the messuage, &c. over the *locus in quo* to and from the messuage, &c. as appertaining thereto, and the plaintiff traversed the prescriptive right, it was held that the defendant's showing that he was seised in fee of an ancient messuage in the parish, to which a right of way, as pleaded over the *locus in quo*, belonged, was evidence sufficient to support his plea, though the messuage was let to, and in the occupation of a tenant, and the defendant only occupied a new-built house in the parish, at the time of the trespass committed. *Stott v. Stott*, 16 *East*, 343. If the plaintiff meant to insist that the right stated would not cover the exercise of a right of way to the new house, he should have done so, either by a new assignment, or by a special replication to that effect. *Ibid*. 349. In some cases it is proper both to reply and to plead a new assignment. Where the plea, on the face of it, professes to answer the whole matter of the declaration, but in fact only answers part, as where, to a declaration for a trespass to a close called A., the defendant pleads a right of way over A., and in the exercise of such right justifies the acts complained of, but in fact the defendant not only committed the acts complained of, in that part of A. over which the alleged way passes, but also in other parts of A., the plea, as it has been said, has only " hit some of the places wherein the plaintiff intended the trespass," and the trespasses in the other part of the close remain unanswered. *Prettyman v. Lawrence, Cro. Eliz.* 812. *Odeham v. Smith, Cro. Eliz.* 589. If therefore the plaintiff is desirous of denying the right of way, thinking that he can recover for the trespass justified in the plea, as well as for those which are not *in fact* justified, but only appear to be so, he may traverse the right, and may at the same time new-assign *extra viam*, and thus entitle himself

to give evidence of trespasses committed in every part of the close.

Where the defendant pleaded a prescriptive right of way from his own close "next adjoining to the said closes in which," &c. unto, into, through, over and along the said closes in which, &c., and it appeared that his own close did in one part adjoin the plaintiff's, but that the way passed over the land of a third person between the close of the defendant and the closes in which, &c., it was held that the plea was sufficiently proved. *Simpson v. Lewthwaite*, 3 *B. and Adol.* 226. *See Wright v. Rattray*, 1 *East*, 377. *Jackson v. Shillito*, 1 *East*, 381, *ante*, *p.* 347.

Where the defendant pleads that A. B. was seised in fee, and being so seised, granted a right of way by non-existing grant, and the plaintiff traverses the grant, it is not competent for the plaintiff upon that issue to show that A. B. was not seised in fee, for the purpose of rebutting the presumption of the grant, he being estopped by the admission on record. *Cowlishaw v. Cheslyn*, 1 *Crom. and Jer.* 48.

A plea of right of way stated a surrender to the defendant of a copyhold, with all ways then used by the tenants and occupiers thereof, and that the defendant was admitted and continued seised, and being so seised and having occasion to use the way, committed the trespass. The replication traversed the right of way being used at the time of the surrender, and there was a new assignment that the defendant used the way for other purposes, to which the defendant pleaded not guilty. The right of way was established in evidence, but it appeared that when the trespass was committed, the tenement, in respect of which the way was claimed, was in the possession of a tenant, and that the defendant, as landlord, went over the *locus in quo* to assert a right to the way which had been obstructed. The court held that the defendant had a right so to use the way, and that the language of the plea comprehended all the purposes for which a person seised of the tenement might lawfully use the way. *Proud v. Hollis*, 1 *B. and C.* 8.

By the rules of Hilary Term, 4 W. 4, it is provided that where, in an action of trespass *quare clausum fregit*, the defendant pleads a right of way with carriages and cattle and on foot, in the same plea, and issue is taken thereon, the plea shall be taken distributively; and if a right of way with cattle, or on foot only, shall be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of way so found; and for the plaintiff in respect of such of the trespasses as shall not be so justified.

And in all actions in which such right of way, or other similar right is so pleaded, that the allegations as to the extent

of the right are capable of being construed distributively, they shall be taken distributively.

The time of prescription with regard to rights of way is now altered by 2 and 3 W. 4, c. 71. The provisions of which have been already stated, *ante*, p. 24. The 5th section relates more particularly to pleadings in actions of trespass. By that section, it is enacted, that in all pleadings to actions of trespass, and in all other pleadings, wherein, before the passing of the act, it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof, as of right, by the occupiers of the tenements in respect whereof the same is claimed for and during such of the periods mentioned in the act as may be applicable to the case, and without claiming in the name or right of the owner of the fee as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of fact, or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation.

Where the defendant pleads in the form above given, and the plaintiff replies that the defendant has not enjoyed, &c. as of right, the plaintiff under this issue may give in evidence applications made by the defendant during the twenty years to use the way, and need not reply the fact of such applications specially. Per Lord Lyndhurst, "The simple issue is, whether there has been a continued enjoyment of the way for twenty years, and any evidence negativing the continuance is admissible. Every time the occupiers asked for leave, they admitted that the former licence had expired, and that the continuance of the enjoyment was broken." *Monmouth Canal Company v. Harford*, 1 *Crom. M. and R.* 614. *Vide ante, p.* 344.

Evidence on plea of right of common.] On a right of common pleaded, the plaintiff may either deny the prescriptive or other right stated in the plea, or he may traverse the measure of the common, viz. that the cattle were the defendant's own cattle, and that they were *levant* and *couchant* upon the premises and commonable cattle. *Robinson v. Raley*, 1 *Burr.* 316. *B. N. P.* 23. But under this replication the plaintiff will fail if it appear that some of the cattle were the defendant's commonable cattle levant and couchant, for the number mentioned in the declaration is not material. 1 *Saund.* 346, *e* (*n*). *Ellis v. Rowles, Willes*, 638. The plaintiff in such case should new assign. The plaintiff may also reply an approvement of the common, if it be common of pasture; *Glover v. Lane*,

3 *T. R.* 445, 1 *Saund.* 353, *b* (*n*); or that a common has been inclosed for upwards of twenty years, and if issue be taken on this replication, and it appear in evidence that part of the common has been inclosed for twenty years, and that trespasses have in fact been committed in such part, the plaintiff is entitled to recover for such trespasses, though the rest of the common is uninclosed. *Tapley v. Wainwright*, 2 *Nev. and Mann.* 697, overruling the dictum of the Court, in *Hawke v. Bacon*, 2 *Taunt.* 157. And it has lately been held, that upon issue joined on the right of common, the plaintiff may prove a custom for the lord of the manor to inclose parcels of the waste, and a grant to himself of the *locus in quo* under such custom. *Arlett v. Ellis*, 7 *B. and C.* 346.

Where in trespass for breaking and entering the plaintiff's close, the defendant in his plea prescribed in right of a messuage and land, for a right of common of pasture on a down or common, whereof the close, &c. before the wrongful separation thereof, was parcel, and justified the trespass, because the close in which, &c. was wrongfully inclosed and separated from the rest of the common, and the plaintiff replied, that the close in the declaration mentioned, in which, &c. was a close called *Burgey Cleave Garden*, and had for thirty years and more been separated, and divided and inclosed from the common, and occupied and enjoyed all that time in severalty, and adversely to the person holding the messuage and land, in respect of which the right of common was claimed; and the defendant rejoined that the close in which, &c. had not been occupied or enjoyed for thirty years or upwards, in severalty or adversely, as alleged in the replication; and the jury found that part of the garden had been inclosed within the thirty years, and that the alleged trespass was committed in that part of the garden only; it was held that upon this finding the defendant was entitled to the verdict, whether the words of the issue, "the close in which," &c. constituted an entire or divisible allegation; if it was an entire allegation, it comprehended the whole of the inclosure to which the name of *Burgey Cleave Garden* attached, and in that case the plaintiff was bound to prove that the whole of the garden had been inclosed upwards of thirty years, or if it was a divisible allegation, it was confined in its meaning to that spot in which the trespass had been committed, and the jury having found that the spot had not been inclosed thirty years, it was immaterial whether the rest had been so or not. *Richards v. Peake*, 2 *B. and C.* 918.

By the rules of H. 4. W. 4, it is provided that where, in an action of trespass *quare clausum fregit*, the defendant pleads a right of common of pasture for divers kinds of cattle, *ex. gr.* horses, sheep, oxen and cows, and issue is taken thereon, if a right of common for some particular kind of commonable

cattle only be found by the jury, a verdict shall pass for the defendant, in respect of such of the trespasses proved as shall be justified by the right of common so found; and for the plaintiff, in respect of the trespasses which shall not be so justified.

And in all actions in which such right of common as aforesaid, or other similar right, is so pleaded that the allegations as to the extent of the right are capable of being construed distributively, they shall be taken distributively.

Evidence on plea of license.] If to a plea of license the plaintiff reply a denial of the license, the defendant must prove a license sufficient to entitle him to commit the act complained of. The keeping open of the doors of a house in which there is a public billiard-table, is a license in fact to all persons to enter for the purpose of playing. *Ditcham v. Bond, 3 Campb.* 525. It is not sufficient to show a license by a servant, unless it be in law the license of the master; *Holdingshaw v. Rag, Cro. Eliz.* 876; or by a wife; *Taylor v. Fisher, Cro. Eliz.* 245; or by a daughter; *Cock v. Wortham, Selw. N. P.* 1040; unless the circumstances of the case show that the wife or the daughter was the agent of the party, for granting such license. A license includes, as incident to it, a power to do every thing without which the act licensed cannot be done. Thus if A. license B. to enter his house to sell goods, B. may take assistants, if necessary, for the purpose of selling the goods, and if it be pleaded that B. C. and D. his servants, by his command entered for that purpose, and necessarily continued there for so long, it will be intended that it was necessary for them all to enter; *Dennet v. Grover, Willes,* 195; but an authority from a tenant to his landlord in the absence of the former, to let the premises, will not justify the landlord in entering the premises (the key being lost) through a window, by means of a ladder, in order to show the house. *Ancaster v. Milling, 2 D. and R.* 714.

If the plaintiff in fact did license the defendant, and the defendant has exceeded the license, such excess cannot be given in evidence under a denial of the license, but should be new assigned; *Ditcham v. Bond, 3 Campb.* 524; 1 *Saund.* 300, *d* (*n*); but it seems that where the defendant pleads that he committed the trespass complained of with the license of the plaintiff, a revocation of the license may be proved, upon an issue joined upon this plea, for it shows that there was no license at the time of the trespass. *Per Best, C. J., and Holroyd, J., Bridge v. Seddall, Derby Sp. Ass.* 1827; 2 *Phill. Ev.* 194, *7th ed., but see Serjeant Williams's note,* 1 *Saund.* 300, *d*. And so where a man abuses an authority in law, whereby he becomes a trespasser *ab initio*, such abuse must be replied. 1 *Saund.* 300, *d* (*n*). On the other hand,

where the plaintiff means to deny the justification set up in the plea, he must make issue upon it, and not new assign. Thus, where the defendant pleads an entry to abate a nuisance, and the plaintiff new assigns unnecessary violence, he will not be allowed to give evidence to negative the nuisance. *Pickering v. Rudd*, 1 *Stark.* 56. And where the declaration states the trespasses to have been committed on divers days and times, and the defendant pleads a license, to which the plaintiff replies *de injuriâ suâ propriâ absque tali causâ*, the defendant must show a license co-extensive with the trespasses proved, and the plaintiff will succeed, unless the defendant can show a license for each trespass proved by the plaintiff. *Barnes v. Hunt*, 11 *East*, 451.

Evidence under new assignment.] A new assignment waives and abandons the trespass which the defendant has justified. 1 *Saund.* 299, *c* (*n*). Therefore where the defendant pleads *lib. ten.* and the plaintiff new assigns, the defendant ought not to plead that the place mentioned in the new assignment is the same as that mentioned in the plea, but if in truth they are the same, the defendant should plead *not guilty*, and the plaintiff will not be allowed to give evidence of any trespasses committed in the place mentioned in the plea. *Pratt v. Groome*, 15 *East*, 235. *B. N. P.* 92. So where the defendant pleaded that the place where, &c. was part of a common which had been allotted to him, to which the plaintiff new assigned that the trespass complained of was in another place; upon its being stated in the opening of the plaintiff's counsel to the jury that the trespass was in the same place, but that the defendant had no title to it, it was held that the plaintiff could not recover. *Anon. cited* 16 *East*, 86. So if the defendant justifies under legal process, which is in fact irregular, and the plaintiff, instead of traversing the plea, new assigns that the trespass complained of was on another and different occasion, such new assignment admits the justification stated in the plea, and if the plaintiff can only prove one trespass, that trespass will be covered by the plea, and the defendant will be entitled to a verdict. *Oakley v. Davis*, 16 *East*, 82; *and see Atkinson v. Matteson*, 2 *T. R.* 176, *ante*, *p.* 471.

On the other hand, if there were in fact two trespasses, and there is only one count in the declaration, and the defendant has pleaded a justification which he can prove, though he cannot prove a justification to both trespasses, the plaintiff must new assign, for the defendant will be entitled to a verdict on proving his justification, and the plaintiff cannot give evidence of the other trespass, *see ante, p.* 471. So where the plaintiff relies on an excess by the defendant, he must new assign such excess. *Ibid.*

In some cases, as already stated, *ante, p.* 491, the plaintiff

may both reply and new assign, and will, if he succeeds, be entitled to recover for the trespasses attempted to be justified in the plea, as well as for those covered by the new assignment. But the plaintiff cannot both reply and new assign, where the plea in fact covers the whole of the trespasses which can be proved under the declaration. Thus, where in trespass for stopping the plaintiff's cattle and cart on a particular day, the defendant pleaded in justification that the plaintiff was loading his cart with turf wrongfully cut from a waste, and that he, as a bailiff of the lord, took it from him, to which the plaintiff replied *de injuriâ*, &c. and new assigned trespasses on other days, it was held that the plaintiff could not both reply and new assign. *Taylor v. Smith*, 7 *Taunt.* 156. *Cheasly v. Barnes*, 10 *East*, 73.

Where the defendant justifies and the plaintiff relies upon an act which renders the defendant a trespasser *ab initio*, such act should be replied, for should the plaintiff new assign that the trespass is a different trespass, he cannot recover, since he can only prove one continued act of trespass, the justification of which is admitted by the new assignment. *Aitkenhead v. Blades*, 5 *Taunt.* 198. Nor can the plaintiff in such case recover under a replication of *de injuriâ suâ propriâ absque tali causâ*. *Lambert v. Hodgson*, 1 *Bingh.* 317.

TRESPASS FOR MESNE PROFITS.

In an action of trespass for mesne profits, which may be brought in the name of the lessor of the plaintiff in ejectment, or (where the record in ejectment is evidence of the title) in the name of the nominal plaintiff, the plaintiff must prove, 1, His title; and 2, His re-entry (where put in issue by the pleadings); 3, The defendant's liability; and 4, The amount of damages.

Evidence of title.] The judgment in ejectment is sufficient proof of title for the plaintiff in this action, whether it be brought by the lessor of the plaintiff, or by the nominal plaintiff, against all who are parties to such judgment, and whether the judgment in ejectment be upon verdict or by default; *Aslin v. Parkin*, 2 *Burr.* 665; *B. N. P.* 87; but it is only evidence of title from the time of the demise laid in the declaration in ejectment, and therefore, if the plaintiff seeks to recover damages anterior to that time, it will be necessary for him to give further evidence of his title. *B. N. P.* 87. The judgment in an action of ejectment, on the several demises of two or more persons, will be evidence of title for them in a joint action of trespass brought by them. *Chamier v. Clingo*,

5 *Maule and S.* 64. The judgment may be proved by an examined copy, *ante, p.* 70.

Evidence of re-entry.] As the plaintiff's right to recover damages for the time during which he was out of possession depends upon the proof of re-entry, which operates to revest the possession in him *ab initio, vide ante, p.* 483, such re-entry must be proved. Where the action is brought against a person who was party to the ejectment, and entered into the consent rule, proof of the judgment in ejectment is said to be sufficient, without proving the writ of possession executed, because, by entering into the rule to confess, the defendant is estopped both as to the lessor and lessee, so that either may maintain trespass without proving an actual entry. *B. N. P.* 87. But where the judgment is against the casual ejector, and no rule therefore has been entered into, the lessor cannot maintain trespass without an actual entry, and therefore ought to prove the writ of possession executed; *B. N. P.* 87; which is done by producing an examined copy of the writ and of the sheriff's return. The plaintiff may also prove a re-entry by showing that he was let into possession with the consent of the defendant. *Calvart v. Horsfall*, 4 *Esp.* 167.

Evidence of defendant's liability.] The plaintiff must prove the defendant's liability, by showing him in possession of the premises. For this purpose the judgment in ejectment will be evidence against one who was a party to it, though not against a stranger, and therefore a judgment in ejectment against a wife cannot be given in evidence against her husband; *Denn v. White*, 7 *T. R.* 112; but it is evidence against a person who comes into possession, pending the judgment in ejectment, under the defendant in ejectment. *Doe v. Whitcomb*, 8 *Bingh.* 46. And where, after judgment by default against the casual ejector, an action for the mesne profits was brought against the landlord, who had been in the receipt of the rents and profits from the day of the demise, Lord Ellenborough ruled that the judgment in ejectment was not evidence against the defendant, without notice of the ejectment, but that a subsequent promise by him to pay the rent and costs amounted to an admission that he was a trespasser, and that the plaintiff was entitled to the possession. *Hunter v. Britts*, 3 *Campb.* 455. Though the judgment in ejectment is evidence to show the liability of the defendant, yet it is no evidence of the time during which the defendant has been in possession; the consent rule admits possession by the defendant at the time of the service of the declaration; but if the plaintiff seeks damages for an earlier period, he must give further evidence of the possession. *Doe v. Gibbs*, 2 *C. and P.* 615.

The damages.] The plaintiff must be prepared to prove the value of the mesne profits, and he may recover not only the actual mesne profits, but also damages for his trouble, &c. *Goodtitle v. Toombs*, 3 *Wils.* 121. So he may recover the amount of the taxed costs of the ejectment, but not any extra costs. *Doe v. Davis*, 1 *Esp.* 358. *Brook v. Brydges*, 7 *B. Moore*, 471. He may likewise recover, by way of damages, costs incurred by him in a court of error in reversing a judgment in ejectment obtained by the defendant. *Nowell v. Roake*, 7 *B. and C.* 404.

Defence.

If the plaintiff seeks to recover the mesne profits for more than six years, the defendant may plead the statute of limitations. *B. N. P.* 88. But bankruptcy is no defence, the demand being for unliquidated damages. *Goodtitle v. North*, 2 *Dougl.* 584. Under the general issue the defendant cannot give in evidence that the plaintiff accepted the rent of the premises for the time in dispute, and agreed to waive the costs of the ejectment. *Doe v. Leo*, 4 *Taunt.* 459. Where he is not concluded by the record in ejectment, the defendant may controvert the plaintiff's title.

Recovery of the mesne profits in ejectment.] By stat. 1 Geo. 4, c. 87, s. 2, whenever it shall appear on the trial of an ejectment, at the suit of a landlord against a tenant, that the tenant or his attorney has been served with due notice of trial, the plaintiff shall not be non-suited for default of the defendant's appearance, or of confession of lease, entry, and ouster, but the production of the consent rule and undertaking of the defendant, shall in all such cases be sufficient evidence of lease, entry, and ouster, and the judge, before whom the cause is tried, shall permit the plaintiff (whether the defendant shall appear upon such trial or not), after proof of his right to recover possession of the whole or of any part of the premises mentioned in the declaration, to go into evidence of the mesne profits, from the day of the expiration or determination of the tenant's interest, down to the time of the verdict given in the cause, or to some preceding day, to be specially mentioned therein; and the jury on the trial, finding for the plaintiff, shall, in such case give their verdict upon the whole matter, both as to the recovery of the whole or any part of the premises, and also as to the amount of the damages to be found for the mesne profits; provided that this shall not be construed to bar any landlord from bringing an action of trespass for the mesne profits which shall accrue from the verdict, or the day therein specified, down to the day of the delivery of possession of the premises recovered in the ejectment.

TROVER.

The evidence in an action of trover will depend upon the issue joined. Nothing but the mere fact of conversion is necessary to be proved under the general issue, since the rules of H. 4 W. 4. The facts which constitute a complete title for the plaintiff, in this action, and which must be proved, if denied by the pleadings, are, 1, A general or special property in the goods, or, as against a wrong-doer, a possession of them; 2, An actual or constructive possession, or right of possession; and 3, A conversion by the defendant. In addition to this the plaintiff must prove, 4, The value.

Evidence of general property in the goods.] Where the property in the goods is put in issue, the evidence for the plaintiff will depend upon the nature of his particular title. Where there is both a general and a special owner, but the general owner has not transferred his *right* to the possession, he may still maintain this action; thus, where he has delivered the goods to a carrier or other bailee, and so parted with the actual possession, he may still maintain trover for a conversion by a stranger, for the owner retains the possession in law, as against a wrong-doer, and the carrier or other bailee is only his servant. *Gordon v. Harper*, 7 *T. R.* 12. 2 *Saund.* 47, *b* (*n*). And if the bailee of goods for a special purpose transfers them to another, in contravention of that purpose, the general owner may maintain trover against that person, though he be a *bonâ fide* vendee, unless the goods have been sold in market overt. *Wilkinson v. King*, 2 *Camph.* 335. *Loeschman v. Machin*, 2 *Stark.* 311, *but see* 2 *Saund.* 47, *b* (*n*).

Evidence of general property—vesting of the property.] With regard to the time at which the property passes on the *sale* of goods, it is laid down in a very recent case, that where goods are sold, and nothing is said as to the time of delivery, or the time of payment, and every thing the seller has to do with them is complete, the property vests in the buyer, so as to subject him to the risk of any accident which may happen to the goods (*see Tarling v. Baxter*, 6 *B. and C.* 360), and the seller is liable to deliver them whenever they are demanded, upon payment of the price, but the buyer has no right to have possession of the goods till he pays the price. If the goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him; but his right of possession is not absolute, it is liable to be defeated if he becomes insolvent before he obtains possession. *Per Bayley, J.*,

Bloxam v. Sanders, 4 *B. and C.* 948. Where goods in bulk are sold at so much a ton, the property in them does not pass by the sale before they are weighed ; *Simmons v. Swift*, 5 *B. and C.* 857 ; and if the contract be within the statute of frauds, and there is no note or memorandum, acceptance or earnest, the contract is by that statute not good, and no property passes. *See Blorsom v. Williams*, 3 *B. and C.* 234, *and see ante, p.* 273. The property in goods passes on a sale by auction, though they are not to be delivered till certain duties are paid by the seller. *Hinde v. Whitehouse*, 7 *East*, 558, *and see Phillimore v. Barry*, 1 *Campb.* 513, *Noy's Max.* 88. Where a quantity of iron was to be delivered, under a contract that certain bills outstanding against the seller should be taken out of circulation, and after a part of the iron had been delivered, and no bills had been taken out of circulation, the seller brought trover for the part delivered, it was held that it being only a conditional delivery, and the condition being broken, the action might be maintained ; and *per Bayley, J.*, if a tradesman sell goods to be paid for on delivery, and his servant, by mistake, deliver them without receiving the money, he may, after demand and refusal to deliver or pay, bring trover for his goods against the purchaser. *Bishop v. Shillito*, 2 *B. and A.* 329 (*n*). *See Brandt v. Bowlby*, 3 *B. and Ad.* 932. So the property which passes by the sale may be divested by the rescinding of the contract. Thus where A. sold goods to B. and afterwards, and before the delivery to B., C. became possessed of the goods, and on being informed of the circumstances, declared that he would not deliver them to any person whatever, it was held that A. having repaid B. might maintain trover against C., the contract between A. and B. being rescinded, and A. being remitted to his former right. *Pattison v. Robinson*, 5 *Maule and S.* 105. Where A. is indebted to C. and B. to A., and it is agreed between them that B. shall deliver goods to C. in satisfaction of A's debt, and B. converts them to his own use, C. may maintain trover for the goods, though he never had possession, for by the agreement the right is in him. *B. N. P.* 35.

Where A. agrees to build a ship for B., and it is part of the terms of the contract that given portions of the price shall be paid, according to the progress of the work, the payment of those instalments appropriates specifically to B. the very ship in progress, and vests in him a property in that ship. *Woods v. Russell*, 5 *B. and A.* 942. But where goods are ordered to be made, so long as the order is not executed, but only in a course of execution, no property in general passes to the person for whom they are to be made. *Bishop v. Crawshay*, 3 *B. and C.* 419. *Mucklow v. Mangles*, 1 *Taunt.* 318. *See Carruthers v. Payne*, 5 *Bingh.* 270. *Atkinson v. Bell*, 8 *B. and C.* 283. *Goode v. Langley*, 7 *B. and C.* 26.

By a *gift* of goods the property does not pass, unless the gift be by deed or instrument of gift, or be executed by an actual delivery of the thing given to the donee. *Irons v. Smallpiece*, 2 *B. and A.* 551. But if A. in London gives J. S. his goods at York, and another takes them away before J. S. obtains actual possession, J. S. may, it is said, maintain trover or trespass for them. *Br. Ab. Trespass*, 303. *Hudson v. Hudson*, *Latch*, 214. 2 *Saund.* 47, *a* (*n*), *sed quære.*

By a *fraudulent or illegal sale or transfer* of goods no property passes, as where a wharfinger, without leave of the owner, sells goods in his possession. *Wilkinson v. King*, 2 *Campb.* 335. So in case of a sale of live pheasants, no property passes, the 58 G. 3, c. 75, prohibiting the buying. *Helps v. Glenister*, 8 *B. and C.* 553. So where a person obtains goods upon false pretences, under colour of purchasing them, the property is not changed. *Noble v. Adams*, 7 *Taunt.* 59. *Kilby v. Wilson*, *R. and M.* 178. *Irving v. Motly*, 7 *Bingh.* 543. So where stolen goods are pawned, the property is not altered; *Parker v. Gillies*, 2 *Campb.* 336 (*n*); *Wilkin's case*, 1 *Leach*, 522, and by stat. 1 Jac. 1, c. 21, s. 5, the sale of any goods wrongfully taken to any pawnbroker in London, or within two miles thereof, shall not alter the property. But if stolen goods are sold in market overt, the property is devested out of the owner. Thus, where stolen goods were purchased in *market overt*, and sold by the purchaser before the felon was convicted, it was held that the owner of the goods, prosecuting to conviction, could not maintain trover against the purchaser who had so sold, under the statute 21 H. 8, c. 11, which gives restitution to the owner who prosecutes the felon to conviction, although he gave the purchaser notice of the robbery while the goods were in his possession; for the property being altered by the sale in market overt, was not revested in the owner till the conviction of the felon, but the defendant had parted with the possession before that time, and therefore could not be said to have converted the plaintiff's goods. *Horwood v. Smith*, 2 *T. R.* 750; *and see Parker v. Patrick*, 5 *T. R.* 175. However, in a very late case it was held that where a person purchases stolen goods, not in *market overt*, and sells them, (after notice of their having been stolen,) in *market overt*, the owner, having prosecuted the thief to conviction, may maintain trover against such person. *Peer v. Humphrey*, 4 *Nev. and M.* 430. In trover for stolen property it does not seem to be necessary for the plaintiff to show the mode by which it passed out of his hands. *Down v. Halling*, 4 *B. and C.* 334.

By a *writ of execution* the property in the goods is not altered until execution executed; *Lucas v. Nockells*, 10 *Bingh.* 182, (but see the opinion of Littledale, J., *Giles v. Grover*, 1 *Clark and F.* 177;) though as between subject and subject the property is bound by the delivery of the writ to the sheriff.

29 *Car.* 2, *c.* 3. The meaning of the words that the goods shall be bound by the delivery of the writ to the sheriff is, that after the writ is so delivered, if the defendant make an assignment of the goods, unless in market overt, the sheriff may take them in execution. *Per Lord Hardwicke, Lewthal v. Tomkins, B. N. P,* 91, *and see R. v. Wells,* 16 *East,* 278. The *binding*, both in the case of the king and of a common person, relates only to the debtor himself and his acts, so as to vacate any intermediate assignment made by him, otherwise than in market overt. *Per Patteson, J., Giles v. Grover,* 1 *Clark and F.* 74. Lord Ellenborough lays down the rule thus—The goods are bound by the delivery of the writ to the sheriff, as against the party himself, and all claiming by assignment from or representation through or under him. *Payne v. Drewe,* 4 *East,* 523.

By a *judgment for damages* in trover, and satisfaction of the damages, the property in the goods taken is vested in the defendant; *Adams v. Broughton,* 2 *Str.* 1078, *Morris v. Robinson,* 3 *B. and C.* 206; where the full value of the article has been recovered; but unless the full amount is recovered the judgment will not bar even other actions of trover. *Per Holroyd, J., ibid.* So judgment for the plaintiff in replevin in the *detinet* for damages, vests the property of the goods in the defendant. *Moore v. Watts,* 1 *Ld. Raym.* 614.

An executor or administrator has the property of the goods of the testator or intestate vested in him before his actual possession; *Com. Dig. Administration* (*B.* 10); and though administration be not granted for a long time, yet, when it is granted, it vests the property in the administrator, by relation, from the time of the death of the *intestate. Ibid.* 2 *Rol. Ab.* 554. *l.* 15. 25. *R. v. Horsley,* 8 *East,* 410. *But see Woolley v. Clark,* 5 *B. and A.* 746; where it is said, *per Abbott, C. J.,* that the property of the deceased vests in the administrator only from the time of the grant of the letters of administration, but that it vests in an executor from the moment of the testator's death.

If a man take the goods of another by wrong, the property is not altered. *Com. Dig. Biens* (*E*). Nor will the property in goods pass by an award. *Hunter v. Rice,* 15 *East,* 100.

Questions have frequently arisen as to the passing of property in bank notes, promissory notes, and other securities for money. The general rule is, that bank notes or bills, drafts on bankers, bills of exchange, or promissory notes, either payable to order or indorsed in blank, or payable to bearer, when taken *bonâ fide*, and for a valuable consideration, pass by delivery, and vest a right thereto in the transferree, without regard to the title or want of title in the person transferring them. *Per Holroyd, J., Wookey v. Pole,* 4 *B. and A.* 9; *citing Miller v. Race,* 1 *Burr.* 452; *Grant v. Vaughan,* 3 *Burr.*

1516; *Peacock v. Rhodes*, 2 *Doug.* 636. So exchequer-bills, *Wookey v. Pole*, 4 *B. and A.* 1; and Prussian bonds. *Gorgier v. Mieville*, 3 *B. and C.* 45. It is said by Holroyd, J., that in these cases it is a question of fact for the jury, under all the circumstances of the case, whether the bill, &c. has been taken *boná fide* or not, and whether due and reasonable caution has been used by the person taking it. *Gill v. Cubitt*, 3 *B. and C.* 477. But in a later case Tindal, C. J., observes, that from *Gill v. Cubitt*, downwards, the decisions have put the title to the note, &c., not on the *bona* or *mala fides*, but on *the degree of caution* with which it has been received. *Eastby v. Crockford*, 10 *Bingh.* 245. The correctness of this principle has been recently doubted, and cannot at present be considered as well established. It is observed by Mr. Baron Parke, delivering the opinion of the Court in *Foster v. Pearson*, 1 *Crom. M. and R.* 855, that since the cases of *Crook v. Jades*, 3 *Nev. and M.* 257, *and Backhouse v. Harrison*, *Id.* 188, it may well be questioned whether the former rule, with regard to the negotiability of bills of exchange, has been wisely departed from, in the cases in which care and caution in the taker of such securities have been treated as essential to the validity of his title, besides and independently of honesty of purpose.

Where a Bank of England note for 1000*l.* dated 12th Oct. 1820, was lost in London in April, 1821, and in June, 1822, was presented for change to a banker in Liverpool, by a person with whom the latter was well acquainted, but who was then in pecuniary difficulties, and he changed it by giving bills which had some time to run, and cash, deducting a commission, without asking any questions how the holder came possessed of it, *Holroyd, J.*, told the jury that if they were of opinion that the defendant received the note fairly and *boná fide*, in the ordinary course of business, and had given full value for it, he would be entitled to a verdict; but if on the other hand he had received it out of the ordinary course of business, and had not in fact given the full value for it, then the plaintiffs would be entitled to a verdict. The jury having found for the plaintiffs, the court refused a new trial. *Egan v. Threlfall*, 5 *D. and R.* 326 (*n*). So where a bill of exchange was stolen during the night, and taken to the office of a discount broker early on the following morning, by a person whose features were known, but whose name was unknown to the broker, and the latter, being satisfied with the name of the acceptor, discounted the bill according to his usual practice, without making any inquiry of the person who brought it, it was held, that, in an action on the bill, by the broker against the acceptor, the jury were properly directed to find a verdict for the defendant, if they thought that the plaintiff had taken the bill under circumstances which ought to have excited the suspicion of a prudent and careful man, and the jury having found for the

defendant, the court refused to disturb the verdict. *Gill v. Cubitt*, 3 *B. and C.* 466. The owner of a check upon a banker for 50*l.* having lost it by accident, it was tendered five days after the date to a shopkeeper, in payment of goods purchased to the value of 6*l.* 10*s.*, and he gave the purchaser the amount of the check, after deducting the value of the goods purchased. The shopkeeper the next day presented the check at the banker's, and received the amount. It was held, that in an action brought by the person who had lost the check, against the shopkeeper, to recover the value of the check, the jury were properly directed to find for the plaintiff, if they thought the defendant had taken the check under circumstances which ought to have excited the suspicion of a prudent man, and secondly, that the shopkeeper having taken the check five days after it was due, it was sufficient for the plaintiff to show that he once had a property in it, without showing how he lost it. *Down v. Halling*, 4 *B. and C.* 330. So where the plaintiffs were robbed of a Bank of England note for 500*l.*, which the defendants, bankers in a small town, some months afterwards, discounted for a stranger, a respectable looking man, by giving him 500*l.* worth of their own notes; in trover for the note, Best, C. J., left it to the jury to determine, as well whether the plaintiffs had acted with due diligence in circulating intelligence of the robbery, as whether the defendant had exercised sufficient caution, and had observed the usual course of business in exchanging the note; the jury having found for the plaintiffs, the court of Common Pleas refused a new trial. *Snow v. Peacock*, 3 *Bingh.* 406. *Snow v. Leatham*, 2 *C. and P.* 314. *Snow v. Saddler*, 3 *Bingh.* 610. The plaintiff left, in a hackney-coach in London, and lost, her reticule containing a 100*l.* bank post bill indorsed in blank, and issued hand-bills proclaiming her loss. The defendant, a banker at Brighton, who had never heard of the loss, cashed the bill for a stranger eight days afterwards. The stranger on being asked his name said he was on a journey, and wrote on the bill a fictitious address in an illiterate hand. The defendant did not inquire where he was staying. It was held that the defendant was liable to the plaintiff for the amount of the note. *Strange v. Wigney*, 6 *Bingh.* 677, 4 *M. and P.* 470, *S. C.* Where a bill has been stolen, the owner must give notice immediately, in order to apprise the public of the loss. When the owner of a bill was robbed of it, eight days before it became due, and did not give notice of his loss till the end of seven days, and then only to the acceptor, Best, C. J., left it to the jury to say whether the plaintiff had done all he ought to do, in order to apprise the public of the loss; and whether the defendant had acted *bonâ fide* and with sufficient caution; the jury having found a verdict for the defendant, the court of Common Pleas refused a new trial. *Beckwith v. Corral*, 2 *C. and P.* 261,

3 *Bingh.* 444, *S. C.* But though the loss ofthe note has not been duly advertised, yet if it has been received under circumstances that induce a belief that the receiver knew that the holder had become possessed of it dishonestly, the true owner is entitled to recover its value from the receiver. The negligence of the owner is no excuse for the dishonesty of the receiver. Yet the negligence of the one may be an excuse for the negligence of the other, and may authorise him to defend himself on the maxim *potior est conditio possidentis. Per Best, C. J.. Snow v. Peacock*, 3 *Bingh.* 406.

Trover lies for a lost bank note which the defendant has converted, though part of the proceeds have been paid by him to the plaintiff, nor does the acceptance of such part waive the tort. *Burn v. Morris*, 4 *Tyr.* 485, 2 *Crom. and M.* 579, *S. C.*

Evidence of special property.] It is sufficient for the plaintiff to prove that he has a special property in the goods converted. Thus a carrier, a bailee, the sheriff who has taken goods in execution; *B. N. P.* 33; the agister of cattle; *Br. Ab. Tresp.* 67; the lord who seizes an estray or wreck before the year and day expired; *B. N. P.* 33; may maintain this action. So if a house be blown down, and a stranger take away the timber, the lessee for life may bring trover, for he has a special property to make use of the same in rebuilding. *Ibid.* In some cases a person who has only a special property may maintain trover, although he has never had actual possession; thus a factor to whom goods have been consigned, but by whom they have never been received, may bring trover for them. *Per Eyre, C. J., Fowler v. Down*, 1 *B. and P.* 47. And where the consignor of goods, hearing that the consignee had stopped payment, indorsed the bill of lading to the plaintiff, without consideration, directing him to take possession of the goods, and the plaintiff demanded the goods from the defendants (wharfingers), who refused to deliver them, it was held that the plaintiff had such a special property as entitled him to maintain trover. *Morison v. Gray*, 2 *Bingh.* 260. *Waring v. Cox*, 1 *Campb.* 369. *Sargent v. Morris*, 3 *B. and A.* 277. Where a person, entitled to the temporary possession of a chattel, delivers it to the general owner for a special purpose, he may, after that purpose is satisfied, and on the refusal of the general owner to return it, maintain trover against him for the chattel. *Roberts v. Wyatt*, 2 *Taunt.* 268. It has been held that a landlord who distrains goods has not such a special property as will enable him to maintain trover, for he has only a pledge, with a power to sell by statute. *Moneaux v. Goreham, Selw. N. P.* 1303. *R. v. Cotton, Parker*, 121, *sed quære.*

Evidence of possession—sufficient against a wrong-doer.] Where the action is brought against a mere wrong-doer, it will be sufficient for the plaintiff to show that he was in possession of the property. Thus where a chimney-sweeper's boy found a jewel, and took it to a jeweller who refused to return it, it was held, that though the finder did not acquire an absolute property, yet he had such a property as would enable him to keep it against all but the rightful owner, and consequently that he might maintain trover. *Armory v. Delamirie*, 1 *Str.* 505. So where the plaintiff bought a vessel which had been stranded, which was not conveyed to him according to the provisions of the registry acts, and took possession of her, and afterwards she went to pieces, and part of the wreck, drifting upon the defendant's premises, was seized by him, it was held that the plaintiff had a sufficient property to maintain this action. *Sutton v. Buck*, 2 *Taunt.* 302. So where the owner of furniture lent it to the plaintiff, under a written agreement, and the plaintiff placed it in a house occupied by the wife of C. a bankrupt, C.'s assignees having seized the furniture, it was held that the plaintiff might recover in trover, without producing the agreement. *Burton v. Hughes*, 2 *Bingh.* 173. Where in trover for copper ore, it was proved that the plaintiff was in possession of land in which he sunk a shaft and raised the ore in question, and the same witness on cross-examination proved that the ore was taken away by a person who had a shaft in an adjoining close, and who was getting the same load of copper ore under the plaintiff's land where he sunk his shaft, it was held that this was *primâ facie* evidence of the plaintiff's right to the ore. *Rowe v. Brenton*, 8 *B. and C.* 737.

Evidence of right of possession.] The plaintiff must show that he has a right to the immediate possession of the goods, or he cannot recover in this action. Thus the purchaser of goods not sold upon credit, though by the contract of sale he acquires the right of property, has no right of possession until he pays or tenders the price. *Bloxam v. Sanders*, 4 *B. and C.* 941, *supra*. A quantity of hops was purchased from the defendants in April 1831, the invoice of which contained the words "*on rent.*" The hops remained in the seller's warehouse, and a bill accepted by the buyer was afterwards given them at their request, which they indorsed on getting it discounted. During the running of that bill, part of the hops was delivered, in pursuance of the buyer's order, to his sub-purchaser, who paid the warehouse-rent charged by the sellers. Afterwards, and before the bill became due, the original buyer became bankrupt, and it was dishonoured at maturity. It was held that though the sellers might not have a right, while the bill remained outstanding, to part with the hops remaining in

their possession, the assignee of the original buyer could not maintain trover for them without actual payment of the price agreed on, as well as of the warehouse rent, he having only the right of property, without that of possession. *Miles v. Gorton*, 4 *Tyr.* 295, 2 *Crom. and M.* 504, *S. C.* Where goods, leased as furniture with a house, have been wrongfully taken in execution by the sheriff, the landlord cannot maintain trover against the sheriff, pending the lease, for he has not the right of possession. *Gordon v. Harper*, 7 *T. R.* 9. *Pain v. Whitaker*, *R. and M.* 99. But where the furniture was let to a married woman living apart from her husband, it was held, that inasmuch as she could not acquire the right of possession by any contract, the owner of the furniture might maintain trover for it. *Smith v. Plomer*, 15 *East*, 607. And where certain mill machinery, together with a mill, had been demised for a term to a tenant, who without permission from his landlord, severed the machinery from the mill, and it was afterwards seized and sold by the sheriff under a *fi. fa.*, it was held that no property passed to the vendee, and that the landlord was entitled to bring trover for the machinery, even during the continuance of the term. *Farrant v Thompson*, 5 *B. and A.* 826. So where lands are leased for years, and a tree is cut down by a stranger during the term, the landlord may maintain trover for it, for when it is severed the special property of the lessee is determined. *Berry v. Heard*, *Cro. Car.* 242, *Croke, J., diss.* 7 *T. R.* 13, 5 *B. and A.* 829, *supra.* But trover cannot be maintained by a tenant in tail expectant on the determination of an estate for life, without impeachment of waste, for timber which grew upon and was severed from the estate, for the tenant for life has a right to the trees the moment they are cut down. *Pyne v. Dor*, 1 *T. R.* 55. *See Williams v. Williams*, 12 *East*, 209; *Channon v. Patch*, 5 *B. and C.* 897. Where a father gave to his son (an infant, sixteen years of age), a watch, and certain books and wearing apparel, it was ruled that the right of possession was in the son, and that the father could not maintain trover for them, though perhaps it might have been otherwise in the case of a very young child. *Hunter v. Westbrook*, 2 *C. and P.* 578.

Evidence of conversion—direct conversion.] The *gist* of the action of trover is the wrongful conversion of the plaintiff's goods by the defendant; but a conversion does not, *ex vi termini*, imply a transfer of property to the defendant, but rather a deprivation of property to the plaintiff. *Keyworth v. Hill*, 3 *B. and A.* 687. A conversion may be proved either by evidence of a direct act of conversion, or by showing a demand of the goods by the plaintiff, and a refusal by the defendant to deliver them. An unlawful taking of goods out of the possession of the owner is itself a conversion. *B. N. P.* 44.

2 *Saund.* 47, *g* (*n*). Therefore a bankrupt may maintain trover against his assignees in order to try the validity of the commission, without proving a demand and refusal, for the taking of the goods by the assignees is a sufficient conversion, and the plaintiff must be deemed to have delivered them on compulsion. *Summerset v. Jarvis*, 3 *B. and B.* 2. So the *using a* thing without the license of the owner, found or delivered to the party using it, is a conversion. *Mulgrave v. Ogden*, *Cro. Eliz.* 219. 3 *B. and A.* 687. Thus the wearing of a pearl is a conversion. *Lord Petre v. Heneage*, 12 *Mod.* 519. So where a person finds a thing, and misuses it, it is a conversion. *Per Cur. Mulgrave v. Ogden*, *Cro. Eliz.* 219. And where a person coming to the possession of land, found there a block of stone belonging to another, and removed it, not to an adjacent place, but to a distance, it was ruled to be a conversion. *Fordsdick v. Collins*, 1 *Stark.* 173; *see Houghton v. Butler*, 4 *T. R.* 364. So drawing part of the liquor out of a vessel, *and filling it up with water*, is a conversion of all the liquor. *Richardson v. Atkinson*, 1 *Str.* 576. But it has been said, in a recent case, by *Patteson and Coleridge, JJ.*, that the conversion of *part* is not the conversion of the *whole*, if the remainder continues in a fit state to be delivered up, and the party offers to deliver it up. *Philpott v. Kelly*, 4 *Nev. and M.* 611. The mere fact of a bailee *bottling* a cask of wine is not evidence of a conversion. *Ibid.* A person in the lawful possession of goods may be guilty of a conversion of them by dealing with them contrary to the orders of the owner. Thus where the owner of goods on board a vessel directed the captain not to land them on a wharf, against which the vessel was moored, which he promised to do, but afterwards delivered them to the wharfinger for the owner's use, under an idea that the wharfinger had a lien thereon for the wharfage fees, this was held a conversion. *Syeds v. Hay*, 4 *T. R.* 260. But where the defendant, who had been entrusted by the plaintiff to sell certain goods in India, not being able to sell them there himself, delivered them to an agent in India, to be disposed of by him, it was held no conversion. *Bromley v. Coxwell*, 2 *B. and P.* 438. In order to constitute an actual conversion, it is not necessary that the party should deal with the goods as his own; thus where a bankrupt being indebted to G. delivered goods to G.'s servant, who gave a receipt for them in G.'s name, and sold them for his use, it was held that this sale was a conversion by the servant. *Perkins v. Smith*, 1 *Wils.* 328. So the misdelivery of goods by a wharfinger; *Devereux v. Barclay*, 2 *B. and A.* 702; or by a carrier; *Youl v. Harbottle*, *Peake*, 49; *Stephenson v. Hart*, 4 *Bingh.* 483; is a conversion, though it is otherwise where he loses goods by accident. *Ibid. Ross v. Johnson*, 5 *Burr.* 2825. *Kirkman v. Hargreaves*, 1 *Selw. N. P.* 425. Proof that the carrier asserted

that he had delivered the goods to the consignee, and that such assertion is false, is not evidence of a conversion. *Attersoll v. Briant*, 1 *Campb.* 409.

The taking the plaintiff's property by assignment from another, who has no right to dispose of it, is a conversion; therefore where the defendant took an assignment of tobacco in the king's warehouse, by way of pledge from a broker, who had purchased it in his own name for his principal, it was held that he had been guilty of a conversion, it being also proved, that when the tobacco was demanded from him by the plaintiff he refused to deliver it. *M'Combie v. Davies*, 6 *East*, 538. *Baldwin v. Cole*, 6 *Mod.* 212; *see also Jackson v. Anderson*, 4 *Taunt.* 25. But where goods were placed in the hands of a factor *for sale*, and he indorsed the bills of lading to the defendants, who thereupon accepted a bill for him, and he at the same time directed the defendants to sell the goods, and reimburse themselves the amount of the bill out of the proceeds, it was held that the defendants, having sold the goods, could not be sued for them in trover by the original owner. *Stiernhold v. Holden*, 4 *B. and C.* 5. So where a broker who is authorised to sell goods at a certain price, sells them at an inferior price, it is no conversion by him. *Dufresne v. Hutchinson*, 3 *Taunt.* 117.

Where A. consigned the goods of B. to C., and C. without notice of the right of B. sold a part, and kept the remainder in his possession, the sale was held to be a conversion. *Featherstonhaugh v. Johnston*, 8 *Taunt.* 237. And where a banker discounted a bill drawn on a customer, and by the acceptance made payable at his bank, after it had been lost by the holder, of which he had notice, and afterwards debited his customer with the amount of the bill, wrote a discharge on it, and delivered it up to the customer as the banker's voucher of his account, it was held that the banker was guilty of an actual conversion. *Lovell v. Martin*, 4 *Taunt.* 799; *and see Beckwith v. Corrall*, 2 *C. and P.* 261. So where the drawer of a bill deposited it with a creditor, giving him authority to receive the proceeds and apply them in a specific way, and the creditor, after the drawer had committed an act of bankruptcy, gave up the bill to the acceptor, and took another instead, this was held to be a conversion by him as against the assignees. *Robson v. Rolls*, 1 *Moo. and Rob.* 239.

Where the defendant took the plaintiff's boat in order to reach his own vessel, which was on fire, being under the plaintiff's care, and the boat was accidentally sunk, Lord Ellenborough was of opinion that this was not a conversion. *Drake v. Shorter*, 4 *Esp.* 165. So it is no conversion if the master of a ship throw goods into the sea to prevent the ship from sinking. *Bird v. Astcock*, 2 *Bulstr.* 280.

It seems that where the defendant has done the act com-

plained of by the license of the plaintiff it is no conversion. Thus, if a person against whom a commission of bankrupt has issued, acquiesces in it so far as to take a part in the sale of his own goods, by recommending an auctioneer to conduct the sale, it is no conversion. *Clarke v. Clarke*, 6 *Esp.* 61.

Evidence of conversion—by demand and refusal.] A demand of the goods by the plaintiff, and a refusal to deliver them by the defendant, he having the power to deliver them, are evidence of a conversion. But being only presumptive evidence of a conversion, it may be rebutted by other evidence to the contrary. 2 *Saund.* 47, *e* (*n*). A demand and refusal are evidence of a *prior* conversion. *Per Cur. Wilton v. Girdlestone*, 5 *B. and A.* 847. A distinct refusal must be proved, mere evasive excuses for not delivering the goods will not be sufficient. *Severin v. Keppell*, 4 *Esp.* 156. But where, in trover by assignees of a bankrupt for a landau, it appeared that, after the act of bankruptcy, the bankrupt had sold the landau to the defendant, and that a written demand of it had been left by the plaintiffs at the defendant's house; but it did not appear that the latter had expressly refused to deliver it up, Richardson, J., ruled that the demand, and the non-delivery in pursuance of that demand, were evidence of a conversion. *Watkins v. Wolley*, *Gow*, 69.

Whenever the circumstances are not such as to amount to an actual conversion, the plaintiff, in order to recover, must prove a demand and refusal. Thus where a trader on the eve of a bankruptcy makes a collusive sale of goods to A., the assignees cannot maintain trover against A. without proof of a demand and refusal. *Nixon v. Jenkins*, 2 *H. Bl.* 135. *Perkins v. Smith*, 1 *Wils.* 328, *supra*. *Jones v. Fort*, 9 *B. and C.* 764. *Tennant v. Strachan*, *M. and M.* 377.

In order to render a demand and refusal evidence of a conversion, it must appear, that, at the time of the demand made, the party had it in his power to deliver up or retain the article demanded. *Smith v. Young*, 1 *Campb.* 441.

There are many cases in which a refusal to deliver goods will not be evidence of a conversion. Thus where the party detaining them refuses to deliver, on the ground of having a present right to the possession, as where a carrier or wharfinger detains goods as a lien for his carriage or wharfage. *Skinner v. Upshaw*, 2 *Lord Raym.* 752. *York v. Greenaugh*, *id.* 866. But where a person who has a lien, on demand made, does not claim to retain the goods in right of his lien, but as his own property, it will be evidence of having waived his lien. *Boardman v. Sill*, 1 *Campb.* 410 (*n*). Thus where the vendor of goods, in order to stop them *in transitu*, applied to the captain to deliver them up, but did not tender the freight, and the captain refused, alleging that he had signed a bill of

lading to deliver the goods to another, it was held that he had dispensed with any tender of the freight, and that the demand and refusal were presumptive evidence of a conversion. *Thompson v. Trail*, 6 *B. and C.* 36, 9 *D. and R.* 31, *S. C.* Yet when the defendant, who had a lien on some cloth, purchased it from the bailor after he had become bankrupt, and when the cloth was demanded of him by the assignees, refused to give it up, saying, "I may as well give up every transaction of my life," it was held that these words were no waiver of his lien, and that the lien was not merged in the purchase. *White v. Gainer*, 2 *Bingh.* 23. So if a person who finds goods refuses to deliver them to the owner, until he proves his right to them, such refusal is no evidence of a conversion. *Green v. Dunn*, 3 *Campb.* 215 (*n*). *Solomon v. Dawes*, 1 *Esp.* 83. *Gunton v. Nurse*, 2 *B. and B.* 449, 2 *B. and P.* 464. So where goods, the property of the plaintiff, had been, by the servants of an insurance company, carried to a warehouse, of which the defendant, a servant of the company, kept the key, and the defendant, on being applied to by the plaintiff to deliver them up, refused to do so without an order from the company, it was held that this refusal was no evidence of a conversion. *Alexander v. Southey*, 5 *B. and A.* 247. But where a person who claimed to have a lien upon goods, delivered them to a bailee, and the real owner demanded them of the latter, who refused to deliver them without the directions of the bailor, it was held that the bailor not having any lien upon the goods, the refusal by the bailee was sufficient evidence of a conversion. Per Lord Tenterden, "A bailee can never be in a better situation than the bailor. If the bailor has no title, the bailee can have none, for the bailor can give no better title than he has. The right of property may, therefore, be tried in action, against the bailee." *Wilson v. Anderton*, 1 *B. and Ad.* 450. A refusal by the general agent of a party is not evidence of a conversion by that party; it must be shown that, in the particular fact of the refusal, the agent acted under the special directions of his principal. *Per Gibbs, C. J., Pothonier v. Dawson, Holt*, 383. But proof of a refusal by the servant of a pawnbroker has been held to be evidence of a conversion by his master. *Jones v. Hart*, 2 *Salk.* 441. In trover for bricks, where the evidence to prove the conversion was, that some men fetched away the bricks in a cart, on which the defendant's name was painted, and that the men, on being asked why they did so, said they were ordered by their master, Mr. W. (the name of the defendant), Lord Gifford ruled that there was no evidence to connect the defendant with the transaction. *Everest v. Wood*, 1 *C. and P.* 75.

A demand of payment for the goods has been held a sufficient demand; *Thompson v. Shirley*, 1 *Esp.* 31; and service of a written demand, by leaving it at the house of the defendant,

is good. *Logan v. Houlditch*, 1 *Esp*. 22. Where two independent concurrent demands have been made, one verbal and the other in writing, proof of either will be sufficient. *Smith v. Young*, 1 *Campb*. 440. A demand and refusal of fixtures is no evidence of the conversion of articles which are not fixtures. *Colegrave v. Dios Santos*, 2 *B. and C*. 76.

Evidence of conversion, by whom.] As the possession of one jointenant, tenant in common, or parcener, is the possession of the other or others, trover cannot in general be maintained by one jointenant, &c. against his companion. *Co. Litt*. 200, *a*. 2 *Saund*. 47, *h* (*n*). Thus where the plaintiff and one of the defendants were members of a friendly society, the funds of which were kept in a box deposited with them, and the defendant took away the box and delivered it to the other defendant, who was not a member of the society, it was held that the plaintiff could not maintain trover for the box. *Holliday v. Camsell*, 1 *T. R*. 658. So where one tenant in common of a whale refused to deliver a moiety of it to the other, and cut it up and expressed the oil, it was held that this was no conversion. *Fennings v. Lord Grenville*, 1 *Taunt*. 241. But if one tenant in common, &c. *destroy* the thing in common, trover lies. Thus where one tenant in common of a ship took it away by force and sent it the West Indies, where it was lost in a storm, it was held to be evidence of a destruction by him so as to support an action of trover. *Barnardiston v. Chapman, cited* 4 *East*, 121. *B. N. P*. 34. So it is said that the sale of the whole of a chattel by one tenant in common, without authority of his co-tenant, either express or implied, is, with respect to the other, a wrongful conversion of his undivided part. *Per Bayley, J., Barton v. Williams*, 5 *B. and A*. 403. *Heath v. Hubbard*, 4 *East* 110, 126.

The action may be brought against any person who was a party to the conversion, although the goods were actually converted by another. 2 *Saund*. 47, *m* (*n*). Thus if a person sue out an execution against a bankrupt, and the sheriff seize the goods and sell them, and gives the money to the person suing out the execution, the assignees may bring trover against the sheriff, or against the party suing out the execution, if he can be proved a party to the conversion, by giving bond to secure the sheriff, and so making it his own act. *Rush v. Baker*, *B. N. P*. 41. And the law seems to be the same, though A. should not give the bond, if he receives the money. *S. C*. 2 *Str*. 996. 2 *Saund*. 47, *m* (*n*). *Nicoll v. Glennie*, 1 *Maule and S*. 592. So where a bankrupt left some plate with his wife, who delivered it to a servant to sell, and the servant delivered it at the door of W's shop to the defendant, who went into the shop and pawned it in his own name, and immediately delivered the money to the servant, who paid it to the wife, it was

held to be a conversion by the defendant. *Parker v. Godin*, 2 *Str*. 813, *B. N. P.* 47.

Trover will lie against a corporation, and it seems not to be necessary to show that the conversion was authorised by an instrument under seal. *Yarborough v. Bank of England*, 16 *East*, 6. *Duncan v. Proprietors of Surrey Canal*, 3 *Stark*. 50.

A servant is liable in an action of trover for a conversion, though for his master's benefit. *Stephens v. Elwall*, 4 *Maule and S.* 259. 5 *B. and A.* 249. So a clerk who refuses to redeliver a bill of exchange, indorsed to him, which he has carried to his master's account. *Cranch v. White*, 1 *Bingh. N. C.* 414, 1 *Scott*, 314, *S. C.*

In an action against several, a joint act of conversion must be proved, in order to obtain a verdict against all. *Nicoll v. Glennie*, 1 *Maule and S.* 588.

Evidence under the general issue.] The evidence admissible under the plea of not guilty in trover is now governed by the rules of H. T. 4 W. 4. The general rule as to the evidence admissible under this plea in actions on the case has been already stated, *ante, p.* 339. To illustrate the application of this rule, the action of trover is mentioned in the following words, "In an action for converting the plaintiff's goods, the conversion only, and not the plaintiff's title to the goods," shall be put in issue by the plea of not guilty. The concluding rule that "all matters in confession and avoidance shall be pleaded specially," applies to this action.

With regard to the extent to which the plea of not guilty operates as an admission of the plaintiff's title, it has been held that it only admits *some* property sufficient to maintain the action, and that the defendant is therefore at liberty to show, under this plea, that he is tenant in common with the plaintiff. *Stancliffe v. Hardwicke*, 2 *Crom. M. and R.* 1.

The word "conversion" used in the rule, means only the *actual* conversion, and not the *wrongful* conversion of the property, and the plea of not guilty consequently only puts in issue the *fact*, and not the legality or illegality of such fact. If, therefore, there are any circumstances of excuse or justification which would furnish a defence, those circumstances must be specially pleaded. Thus, where the plaintiff a wharfinger, and the defendant a carrier, agreed to set up a waggon in common, and each party was to supply two horses, and on a dissolution of the concern, the defendant seized and sold the two horses supplied by the plaintiff, for the alleged purpose of paying the partnership debts; in trover, for this seizure, it was held that the defendant could not give this defence in evidence under the general issue, but that it ought to have been pleaded in confession and avoidance. *Stancliffe v. Hardwicke*, 2 *Crom. M. and R.* 1.

In the above case, Parke, B., in delivering the judgment of the Court, makes the following observations on the necessity of specially pleading a lien where the conversion is by demand and refusal. "A doubt may arise as to the proper course to be pursued, where the defendant has a lien upon the goods, and there has been only a refusal to deliver on demand by the defendant, which demand and refusal, it is well established, is not a conversion of itself, but only evidence of it, and may therefore be explained.

"The court are not under the necessity of pronouncing any judgment upon this question at present, but nothing that has been said is to be taken as an intimation of an opinion, that in such a case, where there has been a refusal to deliver on the ground of lien, the right of lien need be specially pleaded."

Evidence of rent due.] Trover will not lie for goods regularly sold under a distress, the stat. 11 Geo. 2, c. 19, s. 19, giving an action on the case; *Wallace v. King*, 1 *H. Bl.* 13; nor for an *excessive* distress; *Whitworth v. Smith*, 1 *Moo. and Rob.* 193; but for goods taken under a *wrongful* distress trover will lie. *Shipwick v. Blanchard*, 6 *T. R.* 298.

Evidence of general lien.] That the defendant has a lien, either general or special, on the goods, and therefore a right to the possession of them, until his claim is satisfied, is a usual defence in this action. A general lien may be proved either by evidence of an express agreement, or of the mode of dealing between the parties, or of the general dealings of other persons engaged in the same employment, of such notoriety as they may fairly be presumed to be known to the owner of the goods. *Rushworth v. Hadfield*, 7 *East*, 228. *Green v. Farmer*, 4 *Burr.* 2220. To establish a general lien, by evidence of the general usage, the instances ought to be ancient, numerous, and important. *Ibid.*; *and see* 6 *East*, 526; *Holderness v. Collinson*, 7 *B. and C.* 214; *Bleaden v. Hancock*, 4 *C. and P.* 156. Where a number of tradesmen come to an agreement not to receive the goods of any person who will not consent that the goods shall be retained for a general balance, and a party, having notice of such agreement, sends his goods, he will be bound by it. *Kirkman v. Shawcross*, 6 *T. R.* 14. So if a carrier give notice that all goods shall be considered subject to a lien, not only for the freight of the particular goods, but also for any general balance due from the respective owners, perhaps as between the real owner of the goods and the carrier, that may be a binding bargain. *Per Bayley, J.*, *Wright v. Snell*, 5 *B, and A.* 353; *see* 3 *B. and P.* 48. But in such case he has not, as against the real owner, any lien for the balance due to him, from the party to whom the goods are addressed, the mere factor of the owner. *Ibid.* So a usage for

carriers to retain goods, as a lien for a general balance of accounts between them and the consignees, cannot affect the right of the consignor to stop the goods *in transitu*. *Oppenheim v. Russell*, 3 *B. and P.* 42. So also a carrier who, by the usage of a particular trade, is to be paid for the carriage of goods by the consignor, has no right to retain them against the consignee for a general balance due to him for the carriage of other goods of the same sort sent by the consignor. *Butler v. Woolcot*, 2 *N. R.* 64. The lien of wharfingers for their general balance has been proved so often that it is to be considered as a settled point. *Per Ld. Kenyon, Vaylor v. Mangles*, 1 *Esp.* 110. *Spears v. Hartley*, 3 *Esp.* 81.

A banker has a lien for his general balance upon the securities of his customers in his hands. *Jourdaine v. Lefevre*, 1 *Esp.* 66. *Bolland v. Bygrave, R. and M.* 271. So calico-printers. *Weldon v. Gould*, 3 *Esp.* 268. A printer employed to print certain numbers, but not all consecutive numbers, of an entire work, has a lien upon the copies not delivered, for his general balance for the whole of those numbers. *Blake v. Nicholson*, 3 *Maule and S.* 167. With regard to *dyers* a lien for their general balance has been established in several cases; *Savill v. Barchard*, 4 *Esp.* 53; *Humphreys v. Partridge, Montagu Bank. Law*, 18 (*n*), admitted, *arg.* 6 *East*, 523; *Rose v. Hart*, 8 *Taunt.* 499; but in other cases in which such a lien has been claimed, the evidence was insufficient to establish it. *Green v. Farmer*, 4 *Burr.* 2214. *Close v. Waterhouse*, 6 *East*, 523 (*n*). *Bennett v. Johnson*, 2 *Chitty*, 455. Attornies have a lien for their general balance, on papers of their clients which come to their hands in the course of their business. *Stevenson v. Blakelock*, 1 *Maule and S.* 535. Insurance brokers have a lien for their general balance, even against agents who do not disclose their principals; *Mann v. Forrester*, 4 *Camph.* 60; but not where they have notice that the party who employs them is merely an agent. *Maans v. Henderson*, 1 *East*, 335. Factors have a general lien. *Kruger v. Wilcox, Ambler*, 252, 6 *T. R.* 262. And so *packers*, who are in the nature of factors. *Green v. Farmer*, 4 *Burr.* 2222. 4 *Esp.* 55.

Evidence of a particular lien.] In general, where a person bestows his labour on a particular chattel delivered to him in the course of his business, he has a lien upon such chattel for the amount of his charge. Thus a miller has a lien on the corn ground by him; *ex parte Ockenden*, 1 *Atk.* 235, 5 *Maule and S.* 180; a shipwright upon a ship for repairs; *Franklin v. Hosier*, 4 *B. and A.* 341; a tailor on the cloth delivered to and made up by him. *Hussey v. Christie*, 9 *East*, 433, 3 *Maule and S.* 169. So an inn-keeper, or keeper of a house of public entertainment, as a tavern or coffee-house. *Thompson v. Lacy*,

3 *B. and A.* 283. So a master of a vessel upon the luggage of his passengers for passage-money. *Wolf v. Summers*, 2 *Campb.* 631. Where goods are delivered in separate quantities at different times, yet if the work be done under one entire agreement, the right of lien, for the work expended upon the whole, attaches upon every part. *Chase v. Westmore*, 5 *Maule and S.* 180. A livery-stable keeper has not a lien upon the horses in his stable for their keep, without an express agreement; *York v. Greenaugh*, 2 *Ld. Raym.* 866; *Wallace v. Woodgate*, *R. and M.* 194; *Johnson v. Etheridge*, 1 *Crom. and M.* 743; though it is otherwise of an inn-keeper. *Johnston v. Hill*, 3 *Stark.* 172. And a trainer has a lien for his charge in keeping and training a horse. *Bevan v. Walters*, *M. and M.* 236.

The vendor of goods not sold upon credit, has a lien for the price; but where the goods are sold upon credit, such a lien does not arise, *post, p.* 518. And where the purchaser of goods, upon which the seller has a lien, obtains possession of them by fraud, the seller has still a right to the possession, and may maintain trover for the goods. *Hawse v. Crowe*, *R. and M.* 414.

Lien given by factors, &c.] The right of factors and agents to confer a lien on goods intrusted to them is regulated by the statute 6 G. 4, c. 94. By the 2d section of that statute, it is enacted, that any person intrusted, and in possession of any bill of lading, India warrant, dock warrant, warehouse-keeper's certificate, wharfinger's certificate, warrant, or order, for the delivery of goods, shall be deemed and taken to be the true owner of the goods, wares, and merchandises described and mentioned in the said several documents thereinbefore stated respectively, or either of them, so far as to give validity to any contract or agreement thereafter to be made or entered into by such person so intrusted and in possession as aforesaid, with any person or persons, body or bodies politic or corporate, for the sale or disposition of the said goods, wares, and merchandise, or any part thereof, or for the *deposit* or *pledge* thereof, or any part thereof, as a security for any money, or negotiable instrument or instruments, advanced or given by such person or persons, body or bodies politic or corporate, upon the faith of such several documents, or either of them. Provided such person, &c. shall not have notice by such documents, or either of them, or otherwise, that such person so intrusted as aforesaid, is not the actual and *bonâ fide* owner, or proprietor of such goods, wares, or merchandise so sold, or deposited, or pledged, as aforesaid.

Upon this section it has been held, that a person receiving East India warrants from a factor in pledge, cannot retain them, under this statute, against the true owner, if the circumstances were such that a reasonable man, and man of business,

applying his understanding to them, would know that the goods were not the factor's. *Evans v. Trueman*, 1 *Moo. and Rob.* 10.

By the 5th section of this statute, it is enacted, that "it shall be lawful to and for any person or persons, body or bodies politic or corporate, to accept and take any such goods, wares, and merchandise, or any such document as aforesaid, in deposit or pledge from any such factor or factors, agent or agents, notwithstanding such person or persons, body or bodies politic or corporate, shall have such notice as aforesaid, that the person or persons making such deposit or pledge is or are a factor or factors, agent or agents; but then and in that case such person or persons, body or bodies politic or corporate, shall acquire no further or other right, title, or interest in, or upon, or to the said goods, wares, or merchandise, or any such document as aforesaid for the delivery thereof, than was possessed, or could or might have been enforced by the said factor or factors, agent or agents, at the time of such deposit or pledge, as a security as last aforesaid; but such person or persons, body or bodies politic or corporate, shall and may acquire, possess, and enforce such right, title, or interest, as was possessed and might have been enforced by such factor or factors, agent or agents, at the time of such deposit or pledge as aforesaid."

It has been held under this statute, that where a broker accepts bills for his principal, on the security of goods then in his hands, and pledges the goods with a person who has no notice of the agency, and does not inform the principal of the transaction, the broker only transfers such right as he has, which is a right to be indemnified against the bills accepted; and that the principal, having satisfied those bills, has a right to have his goods back from the pawnee without paying the amount for which they were pledged. *Fletcher v. Heath*, 7 *B. and C.* 517. In order to bring a case within this section of the statute, the transfer must have been made expressly as a pledge. *Thompson v. Farmer*, *M. and M.* 48.

Evidence of lien—cases in which a lien does not arise.] It was formerly thought that a lien did not arise where there is an express contract between the parties relative to the price, &c.; but only in cases of implied contract; but it is now settled that a special agreement does not of itself destroy the right to retain, but only when it contains some term inconsistent with that right. Thus where corn is delivered to a miller to be ground, at a certain stipulated sum per load, the miller has a lien for that sum. *Chase v. Westmore*, 5 *Maule and S.* 180. But if, by the agreement, the purchaser of goods is entitled to have the goods immediately, and the payment in respect of them is to take place at a future time, that is incon-

sistent with the right to retain the goods till payment, and the seller will have no lien for the price of the goods. *Crawshay v. Homfray*, 4 *B. and A.* 52, *supra*. Thus where wharfage due upon goods is by the course of trade payable at Christmas, whether the goods are in the mean time removed or not, there arises no lien on the goods for the wharfage. *Id.* 4 *B. and A.* 50.

In general a lien cannot arise unless the party claiming it has possession of the goods. *Kinloch v. Craig*, 3 *T. R.* 119, 783. *Taylor v. Robinson*, 8 *Taunt.* 648. And where a party obtains the possession of goods by misrepresentation, he cannot claim a lien upon them, though had they come rightfully to his hands, he might have been entitled to retain them. *Madden v. Kempster*, 1. *Campb.* 12. *Lempriere v. Pasley*, 2 *T. R.* 485.

In order to establish a lien it must appear that the work, &c. in respect of which it is claimed, was done at the request of the owner of the goods detained, and therefore where a servant took his master's chaise, which had been broken by his negligence, to a coach-maker to be repaired, without his master's knowledge, it was ruled that the coach-maker had no right to retain the chaise against the master, for the repairs. *Hiscox v. Greenwood*, 4 *Esp.* 174.

Evidence of lien—when waived.] A party entitled to a lien may waive it, by not insisting upon it when the goods are demanded from him. *Boardman v. Sill*, 1 *Campb.* 410 (*n*). So he may waive it by parting with the possession, as where the goods are taken in execution at his own suit. *Jacobs v. Latour*, 5 *Bingh.* 130. Where a coach-maker repaired a carriage, and allowed the owner to take it away, it was ruled that he could not retain it for the repairs, when again brought to him. *Hartley v. Hitchcock*, 1 *Stark.* 408, *and see Jones v. Pearle*, 1 *Str.* 557. So where he wrongfully parts with the goods, the owner may recover them in trover from the holder. *Scott v. Newington*, 1 *Moo. and Rob.* 252. And in such case the plaintiff may recover without tendering what is due on the lien; for a party is only obliged to make a tender where it is necessary to give him the right to the possession of the goods. *Jones v. Cliff*, 1 *Crom. and M.* 510, 3 *Tyr.* 576, *S. C.* Where a bailee of goods who had a lien, delivered them to a carrier on account of the bailor, and afterwards stopped the goods *in transitu*, and got possession of them again, it was held that the lien did not revive; *Sweet v. Pym*, 1 *East*, 4; but it has been held that the lien of an insurance-broker (who has a general lien), revives on re-possession of the policy. *Whitehead v. Vaughan*, *Co. Bank. Law*, 547, 7*th ed.* *Levy v. Barnard*, 8 *Taunt.* 149. And where horses, on which a livery stable-keeper had by agreement a lien, were fraudulently taken out of his possession by the owner, it was ruled that the livery stable-keeper having, without force, re-taken the horses,

his lien revived. *Wallace v. Woodgate, R. and M.* 193. Where the owner of a ship, having a lien on the goods, until the delivery of good and approved bills for the freight, took a bill of exchange in payment, and though he objected to it at the time, afterwards negotiated it, it was held that such negotiation amounted to an approval of the bill by him, and that his lien on the goods was waived. *Horncastle v. Farran*, 3 *B. and A.* 497. *Stevenson v. Blakelock*, 1 *Maule and S.* 535. Where the seller of goods recovered a verdict for goods bargained and sold, it was ruled by Lord Ellenborough, that he had not thereby waived his lien, though it might have been otherwise had he recovered a verdict for goods sold and delivered. *Houlditch v. Desanges*, 2 *Stark.* 337. A lien is not destroyed though the demand in respect of which it arises is barred by the statute of limitations. *Spears v. Hartley*, 4 *Esp.* 81.

Where goods, upon which the captain of a ship has a lien, are deposited in the king's warehouse in pursuance of the requisitions of an act of parliament, the lien is not thereby waived. *Per Lord Kenyon, C. J., Ward v. Felton*, 1 *East*, 512. *Wilson v. Kymer*, 1 *Maule and S.* 167.

If a person having a lien abuses it by pledging the goods, the owner's right to the possession revives, and he may maintain trover for them. *Scott v. Newington*, 1 *Moo. and Rob.* 252.

Stoppage in transitu—nature of the right, and by whom it may be exercised.] In trover it frequently happens that the defence arises out of the right of a vendor of goods to stop them *in transitu* upon the insolvency of the vendee. Whether that right is to be considered as a legal right, or as an equitable right imported into courts of law, has been the subject of much dispute, but the balance of authority appears to be in favour of its being an equitable right recognised at law. *Lickbarrow v. Mason*, 6 *East*, 24 (*n*). *Ellis v. Hunt*, 3 *T. R.* 479. *Hodgson v. Loy*, 7 *T. R.* 445. *Feize v. Wray*, 3 *East*, 93. *Hawes v. Watson*, 2 *B. and C.* 54. *Bell's Com. on Laws of Scotland*, 209, *5th ed.* Whether stoppage *in transitu* is a revesting of the possession, or a rescinding of the contract, and a revesting of the right of property, has never been expressly decided. *Per Lord Tenterden, Clay v. Harrison*, 10 *B. and C.* 106.

In general every unpaid vendor of goods has a right, on the insolvency of the vendee, to stop the goods, if still on their way to the vendee. A person abroad, who in pursuance of orders from a merchant in this country, purchases goods on his own credit from persons abroad, unknown to the merchant, and consigns them to his principal here, charging him a commission, is a vendor within the rule. *Feize v. Wray*, 3 *East*, 93. So also is a person who sends goods to be sold on the joint

account of himself and the consignee.' *Newsom v. Thornton*, 6 *East*, 17. *Abbott*, 369. But a person who accepts bills drawn for the price of the goods, by the vendor, is merely a surety for the price, and is not a vendor or consignor so as to be entitled to stop the goods in transitu. *Siffkin v. Wray*, 6 *East*, 370.

What is a transitus—and where continuing.] A *transitus* is said by Lord Mansfield to be "every sort of passage to the hands of the buyers." *Stokes v. La Riviere, cited* 3 *East*, 397. Where there is a contract for the sale of goods, and a delivery has been made to a middleman, who is merely the vehicle between the buyer and seller, the latter, in case of the insolvency of the former, may stop them, at any time before they have arrived in such a state as to be in the actual or constructive possession of the buyer. *Per Lord Alvanley, Mills v. Ball*, 2 *B. and P.* 461. A packer is a middleman between the vendor and the vendee, and the goods in his hands may be stopped. *Hunt v. Ward, cited* 3 *T. R.* 467, *vide post, p.* 522. So goods consisting of silver plate, which had been delivered to a third party to have the vendor's arms engraved upon them, but were to be returned to the vendor before being delivered to the vendee, were held to be still *in transitu* (the engraver being a person usually employed by the vendor). *Owenson v. Morse*, 7 *T. R.* 64.

The *transitus* is continuing though the goods have arrived at an intermediate stage. Thus where goods were ordered by a person at Newcastle from the plaintiff at Birmingham, and were directed to be sent by way of London, addressed to the defendant at the Bank Wharf, with directions to send them by the first vessel to Newcastle, it was ruled that they might be stopped at London, it being merely a stage upon their transit. *Smith v. Goss*, 1 *Campb.* 282. So where goods were ordered by a trader at North Tawton from the plaintiff in London, and directions were given to send them to Exeter, to be forwarded to North Tawton, and they were accordingly put into the hands of a wharfinger to be forwarded, it was held that while in his hands they might be stopped by the vendor. *Mills v. Ball*, 2 *Bos. and Pul.* 457. "The principle to be deduced from the cases is, that the transitus is not at an end, until the goods have reached the place named by the buyer to the seller as the place of their destination." *Per Bayley, J., Coates v. Railton*, 6 *B. and C.* 427.

Whether, where the goods have not arrived at their place of destination, and the consignee goes out to meet them and takes possession of them before their arrival, the right of the vendor to stop them is determined, does not appear to be quite decided. Lord Kenyon ruled that the possession of the purchaser to defeat the right, must be a possession *obtained on the completion*

of the voyage; *Holst v. Pownal*, 1 *Esp.* 240; but Lord Alvanley, in *Mills v. Ball*, 2 *B. and P.* 461, and Chambre, J., in *Oppenheim v. Russell*, 3 *B. and P.* 54, seem to have been of a different opinion. The case of *Foster v. Frampton*, 6 *B. and C.* 107, *post*, also appears to be at variance with the decision of Lord Kenyon in *Holst v. Pownal.*

Where the transitus is ended.] Where the goods delivered to a carrier, or other middleman, have been actually received by the vendee into his own hands, the *transitus* is of course determined. But actual and corporal possession is not necessary. Thus it is said by Chambre, J., that if a man be in the habit of using the warehouse of a wharfinger, packer, &c. as his own, and make it a repository of his goods, and dispose of them there, the journey will be at an end when the goods arrive at that warehouse. *Richardson v. Goss*, 3 *B. and P.* 127, 6 *B. and C.* 109. Goods were ordered from the plaintiffs at Manchester, by Moisseron, the agent of Le Grand and Co., of Paris, and were directed to be sent to the house of the defendant, a packer in London. Moisseron had some of the goods unpacked there, and the remainder repacked. He had a general power either to forward the goods to Le Grand and Co., or to send them to Holland, &c. It was held that the defendant received the goods on account of Moisseron, and that as they were to await his disposal in the defendant's warehouse, the transitus was there at an end. *Leeds v. Wright*, 3 *Bos. and Pul.* 320. So where goods were ordered from persons at Manchester, and were directed to the purchaser at the Bull and Mouth Inn, whence they were conveyed to the warehouse of the defendant, a packer, pursuant to a general order from the purchaser, he having no warehouse of his own, and the goods were booked by the defendant in his name, it was held that the purchaser, having no warehouse of his own, the transitus must be considered as determined. *Scott v. Pettit*, 3 *B. and P.* 469; *see also Richardson v. Goss*, *Id.* 119; 6 *B. and C.* 109, *Rowe v. Pickford*, 1 *B. Moore* 526; 8 *Taunt.* 83, *S. C.*

Where goods have so far arrived at the end of their journey, as to be delivered to the purchaser's agent at a seaport, where they are to remain till the purchaser sends orders for shipping them to a foreign country, the transitus is determined. Goods were furnished by the defendants to the Battiers of London. The course of dealing was to order the goods to be forwarded to Metcalf and Co., at Hull, in order to be shipped to the Battiers' correspondents at Hamburgh. When such goods arrived at Hull, the Metcalfs received orders from Battiers when and to whom to ship them. The goods were forwarded to Hull accordingly, and a portion was shipped on board a vessel for Hamburgh, when the vendors attempted to stop them, but the Court of King's Bench, *dis. Grose, J.*, were of

opinion that the transitus was at an end. *Per Lord Ellenborough*, "The goods had so far got at the end of their journey, that they waited for new orders from the purchaser to put them again in motion, to communicate to them another substantive destination, and without such orders they would continue stationary." *Dixon v. Baldwen*, 5 *East*, 175.

Though the goods remain in the actual possession of the carrier, yet, if the purchaser has done any act equivalent to taking possession, the right of the vendor to stop them is determined. Thus where goods were ordered from the plaintiff, at Sheffield, and were sent by waggon directed to the purchaser in London, where they were brought to the Castle and Falcon, and the provisional assignee of the purchaser, who had become bankrupt, put his mark upon them there, not being able to remove them in consequence of an attachment, the transitus was held to be at an end. *Ellis v. Hunt*, 3 *T. R.* 464. Again, where goods were ordered from the defendant in London by a person in Birmingham, and on their arrival at the warehouse of the carrier in Birmingham, the purchaser removed part to his own premises, and took samples of the rest, desiring they might remain in the warehouse till further directions, it was held that the transitus was determined. *Foster v. Frampton*, 6 *B. and C.* 107.

Upon the same principle it has been held, that where goods are ordered to be sent by sea from a distance, if the shipmaster gives a receipt to the *vendee*, bearing that the goods are received from him, the right of stoppage is determined, the vendors, by empowering the carrier to give the receipt, recognising the right of property in the vendee. *Noble v. Adams*, *Holt*, 248. On the other hand where the receipt was given to the *vendors*, it was held that *the captain of the vessel* who had given such receipt, and had afterwards delivered up the bill of lading to a purchaser from the vendee, was liable to the vendors who had stopped the goods, on the ground that the person holding the receipt has a control over the goods till he has exchanged it for the bill of lading. *Craven v. Ryder*, *Holt*, 100, 2 *Marsh.* 127, 6 *Taunt.* 433, *S. C.*, *and see Ruck v. Hatfield*, 5 *B. and A.* 632. Yet where the bills of lading made the goods deliverable to the consignor, but the master, notwithstanding, delivered the goods to the person by whom they were ordered, and at whose risk they were to be imported, it was held that the consignor could not reclaim them, though the bill of lading had not been indorsed. *Coxe v. Harden*, 4 *East*, 211.

How defeated by part delivery.] The right to stop *in transitu* is defeated by the delivery of part of the goods sold under one entire contract. Thus, where 800 bushels of wheat, part of an entire cargo, were delivered, it was held that it must be

taken to be a delivery of the whole. *Slubey v. Heyward*, 2 *H. Bl.* 504. So where the goods were in the hands of a wharfinger, and the purchaser weighed the whole, and took away twenty-five bales, leaving the remainder on the wharf, it was held that this amounted to taking possession of the whole, and that the privilege of stopping *in transitu* could not attach. *Hammond v. Anderson*, 1 *B. and P. N. R.* 69. "There can be no doubt that wherever there is a complete delivery of part of one entire cargo to the consignee, the transitus is ended, and the consignor cannot stop the remainder." *Per Bayley, J., Crawshay v. Eades*, 1 *B. and C.* 183. But where a carrier, having landed a part of the goods on the wharf of the consignee, resumed it, and took the whole to his own premises, in order to secure his own demand for freight and carriage, this was held not to be such a delivery as to put an end to the consignor's right. *Crawshay v. Eades*, 1 *B. and C.* 181. If the act of delivering part is not intended to operate as a delivery of the whole, but as a delivery of a portion only, this will not deprive the vendor of his lien on the goods undelivered. *Dixon v. Yates*, 5 *B. and Ad.* 313, 2 *Nev. and M.* 177, *S. C. Bunney v. Poyntz*, 4 *B. and Ad.* 570. *Betts v. Gibbins*, 4 *Nev. and M.* 64.

D. bought of Y. forty-six puncheons of rum, lying in the warehouse of Y. at Liverpool, and sold them to C., who was a clerk of Y., but carried on business for himself. D. gave C. an invoice, specifying the marks and numbers of each puncheon, and took his acceptances for the price. The rum and the samples which had been taken remained in Y.'s warehouse. The invariable mode of delivering goods, sold while they are in warehouses at Liverpool, is by the vendor's giving a delivery order to the vendee. D. was asked by C. for delivery orders, but declined giving any except for two or three puncheons, which C. received. C. marked, coopered, and gauged the casks. While the bills were running, C. sold 26 of the puncheons to R., who paid him for them, and who, by C.'s permission, with the knowledge of D., gauged and coopered the casks in the warehouse of Y., and marked them with his initials. C. gave an invoice to K., stating the marks and numbers of the casks, and by whom the rum was bonded. C. also, while the bills were running, sold 18 puncheons of the rum to two other parties, to whom he gave similar invoices and samples, and who afterwards obtained three of the puncheons, on a delivery order signed by themselves, but not by D. They paid C. for the whole. The bills given by C. for the price of the 44 puncheons were dishonoured; it was held, upon a special case, (whereby it was agreed that the court should be at liberty to draw from the facts any inference that the jury might have drawn,) that C. never had acquired the actual possession of the rum, and on his dishonouring his acceptances, D. had a lien

on it for the price; and that C.'s sub-vendees could not claim against D. the rum which remained undelivered to them. *Dixon v. Yates*, 5 *B. and Ad.* 313, 2 *Nev. and M.* 177, *S. C.*; *see Bunney v. Poyntz*, 4 *B. and Ad.* 570.

How defeated, by assignment of bill of lading.] The most usual way in which the right of a vendor to stop goods *in transitu* is defeated is by assignment of the bill of lading to a *bonâ fide* assignee. This point was established, after much argument, in *Mason v. Lickbarrow*, 2 *T. R.* 63, 1 *H. Bl.* 357, 5 *T. R.* 367, 683. *Abbott on shipping*, 398. The assignment must, as it seems, be for a valuable consideration, in order to defeat the right to stop; for though it has been held that where *the vendor* of goods assigns the bill of lading to his agent, *who stops them*, such agent has a sufficient title to sue for them in trover; *Morison v. Gray*, 2 *Bingh.* 260; yet it has never been held that such an assignment *by the vendee* will have the effect of divesting the vendor's title to stop. *See Waring v. Cox*, 1 *Campb.* 369. *Coxe v. Harden*, 4 *East*, 217. Not only must the assignee have given a valuable consideration for the bill of lading, but he must also have acted with fairness and honesty. It is said by Lord Ellenborough, that if he assist in contravening the actual terms of sale on the part of the consignor, or his reasonable expectations arising out of them, or his rights connected therewith, he will stand in the same situation with the consignee. If, for instance, he knows that the consignee has been in insolvent circumstances, and that no bill has been accepted by him for the price, or that, being accepted, it is not likely to be paid, in that case the interposition of himself between the consignor and consignee, to assist the latter in disappointing the just hopes and expectations of the former, will be an act done in fraud of the right to stop, and unavailable to the party taking the assignment. *Cuming v. Brown*, 9 *East*, 514. *Vertue v. Jewel*, 4 *Campb.* 31. Therefore where a person, knowing that the goods are not paid for, takes an assignment of the bill of lading, and agrees to pay for them, the goods not having been paid for, he cannot resist the right of the vendor to stop. *Salomons v. Nissen*, 2 *T. R.* 674, 9 *East*, 515. But the knowledge, that the consignor has not received a money-payment, but has taken the acceptance of the consignee, will not prevent the assignment from destroying the right to stop. *Cuming v. Brown*, 9 *East*, 506. The criterion in these cases is, does the purchaser take the assignment fairly and honestly? 2 *T. R.* 681, 9 *East*, 516. Where a bill of lading was specially indorsed for the delivery of goods to one Voss, if he should accept and pay a bill drawn upon him, and if not, then for delivery to the holder of the draft, and Voss accepted the draft and indorsed the bill of lading to a third person for a valuable consideration, but did

not pay the draft when due; it was held by Lord Ellenborough that this conditional indorsement made it incumbent on the purchaser to ascertain whether the condition had been actually performed, and that he had no title to the goods. *Barrow v. Coles*, 3 *Campb.* 92.

In the following case it was held that there might be circumstances, equivalent to the indorsement and delivery of the bill of lading, so as to enable the consignee to divest the consignor's right to stop the goods. Thompson and Co. sent goods from Ireland to London, to be sold by Eustace and Holland, their factors there, and wrote to them to insure the goods, and sent them a bill of lading not indorsed, but having the names of Eustace and Holland on the back, and being applied to, by them, for an indorsement, answered by letter, that if the bill of lading was not indorsed, it was a mistake, and they would send an indorsement, upon which Eustace and Holland sold the goods, and it afterwards happening that they were unable to pay bills drawn upon them by Thompson and Co. on the general account, one Dick paid those bills for the honour of the drawers, and knowing all their transactions, applied to them for an indorsement of the bill of lading, which they sent him, and thereupon Dick demanded the goods of the master of the ship, who refused to deliver them to him, but delivered them to the vendees of Eustace and Holland. Upon this, Dick brought an action against the master, and Lord Kenyon ruled that the plaintiff had, under such circumstances, no right to take the goods out of the possession of the vendees of Eustace and Holland, E. and H. being factors authorised to transfer the property in them, and having actually done so. *Dick v. Lumsden, Peake*, 189. *Abbott*, 392. So where goods were sold by Beacock and Co. to Cooper and Co., who accepted a bill for the amount, and while that bill was running sold the goods to the plaintiff, who paid for them in cash, and took an assignment of the bill of lading, it was ruled by Lord Ellenborough, that although the bill of lading could not be given in evidence for want of a stamp, the transfer of the property by Cooper and Co. had defeated the right of the vendors to stop the goods. *Davis v. Reynolds*, 4 *Campb.* 267, 1 *Stark.* 115, *S. C.*

The delivery over, by the consignee, to a person who has advanced money to him, of the shipping note of goods, and the giving a delivery order to the wharfinger, are not equivalent to an indorsement of the bill of lading, and will not divest the right of the vendor to stop the goods *in transitu*. *Akerman v. Humphery*, 1 *C. and P.* 53.

The rights of the parties may often depend upon the state of things when the bill of lading was signed and indorsed; thus, where the consignor was indebted to the consignee on the balance of accounts, including bills of exchange still running, ac-

cepted by the consignee for him, it was held that the goods shipped on account of this balance could not be stopped by the consignor, upon the consignee becoming insolvent before the bills were paid. *Vertue v. Jewel*, 4 *Campb.* 31.

Where the bill of lading is signed before the goods were actually on board, it has been said that such an instrument is fraudulent, and that an assignment of it will not bar the right of the vendor to stop the goods. *Osey v. Gardner, Holt*, 405.

Divesting of the vendor's lien.] Where goods remain in the hands of the vendor's agent, the right of the vendor to stop them, on the insolvency of the vendee, may be divested in various ways. Thus, where goods in the hands of a warehouseman were sold, and the vendor gave a delivery order to the purchaser, which he lodged with the warehouseman, who transferred the goods in his books into the purchaser's name, this was held by Lord Ellenborough to be equivalent to an executed delivery, and to divest the vendor's right; and his Lordship also held, that as to a parcel of the goods which had not been transferred, the delivery order alone was sufficient to divest the right. *Harman v. Anderson*, 2 *Campb.* 243. So where goods are lodged in the West India docks, the indorsement of the dock warrant, for a valuable consideration, will divest the vendor's right. *Spear v. Travers*, 4 *Campb.* 251, *Zwinger v. Lamuda*, 7 *Taunt.* 265; and without any transfer being made in the books of the dock company, the delivery of the warrant is sufficient. *Keyser v. Suse, Gow, N. P. C.* 58.

So where a warehouseman sold goods, and received warehouse rent from the purchaser, Lord Ellenborough ruled that this put an end to the right to stop, as much as if the goods had been removed to the purchaser's own warehouse. *Hurry v. Mangles*, 1 *Campb.* 452. So the change of mark from A. to B. on bales of goods in a warehouse was held by the House of Lords to operate as an actual delivery of the goods. *Case cited by Lord Ellenborough, in Stoveld v. Hughes*, 14 *East*, 308.

But where any thing is to be previously done on the part of the seller to ascertain the amount of the price, or to ascertain and perfect the specific subject of the sale, such as, for instance, the weighing the goods, an order for delivery may be countermanded before such previous act be done; *Abbott*, 379; and the vendor may consequently stop the goods. *Withers v. Lyss*, 4 *Campb.* 237, *Holt*, 18, *S. C. Shepley v. Davis*, 5 *Taunt.* 617. *Busk v. Davis*, 2 *Maule and S.* 397.

Stoppage in transitu how defeated—defendant estopped from denying plaintiff's title.] In cases involving the right of the vendor of goods to stop them *in transitu*, it sometimes happens that the question is decided upon the conduct

of the holder of the goods against whom the action is brought, in having recognised the title of the party suing, as in the following case. A. by contract sold to B. a quantity of tallow, then lying at a wharf, at so much per cwt., and on the same day gave a written order upon the wharfingers to weigh, deliver, transfer, and rehouse the same. B. having entered into a contract to sell tallow to C., obtained from the wharfingers and gave to C. a written acknowledgment that they had transferred the tallow to the account of C., and that C. was to be liable to charges from a given date. B. having stopped payment, A. gave notice to the wharfingers not to deliver the tallow to B.'s order. In trover by C. against the wharfingers, it was held that, after this acknowledgment, they had the tallow as the agents of C., and that they could not therefore set up as a defence the right of A. to stop it *in transitu*. *Hawes v. Watson*, 2 *B. and C.* 540, *and see Gosling v. Birnie*, 7 *Bingh.* 339, *supra*. Where the defendant has promised to deliver the goods, it is not material that they were not at that time in his possession, if they afterwards come to his hands. *Holl v. Griffin*, 10 *Bingh.* 246.

Evidence in mitigation of damages.] Although the defendant cannot, under the general issue, object that another part owner of the goods has not been joined as plaintiff, so as to defeat the action; *see Bloxam v. Hubbard*, 5 *East*, 420; yet he may give that fact in evidence, in order to reduce the plaintiff's damages to the amount of his own share. *Nelthorpe v. Darrington*, 2 *Lev.* 113. In an action by a rightful executor against an executor *de son tort*, the latter may prove, in mitigation of damages, that he has paid debts of the deceased. *Whitehall v. Squire, Carth.* 104. But where the defendant, who was appointed executor by a prior will, proved it, and after notice of a later will sold certain goods of the testator, it was held that the plaintiff, who was executor under the later will (the probate of the former being revoked) might recover the whole value of the goods so sold, and that the defendant could not give evidence of the due administration of the assets by himself. *Woolley v. Clark*, 5 *B. and A.* 744, *sed quære*. It is said, that if the payments made by the executor *de son tort*, amount to the full value of the sum to be recovered in the action of trover, the plaintiff shall be nonsuited; *B. N. P.* 48; but the authority cited for this position does not support it, and it is, as it seems, incorrect. *Mountford v. Gibson*, 4 *East*, 447. 2 *Phill. Ev.* 175.

Though a conversion cannot be purged, yet the defendant may show, in mitigation of damages, that he has returned the goods. *Countess of Rutland's case*, 1 *Rol. Ab.* 5.

EVIDENCE IN ACTIONS BY AND AGAINST PARTICULAR PERSONS.

ACTIONS BY ASSIGNEES OF BANKRUPTS.

In an action by the assignees of a bankrupt, the plaintiffs must prove (if denied), 1, The bankruptcy, and the plaintiffs' title to sue as assignees, except in certain cases, in which such evidence is dispensed with; 2, The cause of action in the usual manner.

By the rules of H. 4 W. 4, in all actions by and against the assignees of a bankrupt, or insolvent, or executor, or administrator, or persons authorised by act of Parliament to sue or be sued as nominal parties, the character in which the plaintiff or defendant is stated, on the record, to sue or be sued, shall not in any case be considered in issue, unless specially pleaded.

Evidence of the bankruptcy under 6 *Geo.* 4, *c.* 16, *s.* 90 *and* 92.] By 6 Geo. 4, c. 16, s. 92, if the bankrupt shall not, (if he was within the United Kingdom at the issuing of the commission,) within two calendar months after the adjudication, or, (if he was out of the United Kingdom,) within twelve calendar months after the adjudication, have given notice of his intention to dispute the commission, and have proceeded therein with due diligence, the depositions taken before the commissioners, at the time of, or previous to the adjudication of the petitioning creditor's debt or debts, and of the trading, and act or acts of bankruptcy, shall be conclusive evidence of the matters therein respectively contained, in all actions at law, or suits in equity, brought by the assignees, for any debt, or demand, *for which the bankrupt might have sustained any action or suit.*

Where there are some counts on causes of action on which the bankrupt might have sued, and others on which he could not, the proceedings under the commission are evidence, if the plaintiffs elect to proceed only on those counts which the bankrupt might have sustained. *Jones v. Fort, M. and M.* 196. Where the bankrupt might have sued if he had not become bankrupt, as where property was deposited with the defendant for a special purpose, and converted by him in breach of the bailment, the depositions will be conclusive evidence, though the *conversion* took place after the act of bankruptcy. *Fox v. Mahoney*, 2 *C. and J.* 325.

The plaintiffs declared as assignees, in trover, laying the possession, in one count, in the bankrupt, and the conversion in their own time, and, in the other, both the possession and conversion in their own time. The action (as it appeared by the statement of counsel) was to recover the value of goods, sold for *cash* by the bankrupt to a creditor, who, it was alleged, intended to retain the amount, in fraud of the contract. It was held, that although *the record* did not show that the bankrupt might himself have maintained an action, yet as that appeared to be the case from the state of facts, the depositions were conclusive evidence within the 92nd section. *Kitchener v. Power*, 4 *Nev. and M.* 710.

The above section does not apply to commissions anterior to the act. *Kay v. Goodwin*, 6 *Bingh.* 576. It seems doubtful how far the above section is affected by the 1 and 2 Wm. 4, c. 56, s. 17, which authorises the bankrupt to dispute the *adjudication* by petition to the Court of Review, which may grant an issue for trying the validity of the adjudication; and if the verdict or adjudication shall not be set aside, such verdict or adjudication shall, as against the bankrupt, the petitioning creditor, and any assignee, and all persons claiming under the assignee, and all persons indebted to the bankrupt's estate, be conclusive evidence that the party was or was not a bankrupt at the date of such adjudication.

Where the assignees unnecessarily went into evidence of the trading, in consequence of a notice to dispute, (without adverting to the provisions of 6 Geo. 4, c. 16, s. 92,) and having failed to establish the trading were nonsuited, the court refused to set the nonsuit aside. *Johnson v. Piper*, 2 *Nev. and M.* 672.

By the term *conclusive evidence*, in the 92d section of the 6 G.4, it must be understood that no evidence is to be admitted to contradict the depositions, the construction at first put upon Sir S. Romilly's act. *Eden*, 370. But if the depositions do not, *upon the face of them*, prove a debt, trading, or act of bankruptcy respectively, the law will be the same as it was under Sir S. Romilly's act, and the assignees will not be entitled to recover. *Id.* 371, 3*rd edit.* Thus, where the deposition states a debt due from the bankrupt, as drawer of a bill of exchange, but does not state any presentment to the acceptor, the deposition will not be evidence of the debt. *Cooper v. Machin*, 1 *Bingh.* 426. *Lawson v. Robinson*, 1 *Stark.* 456. *Marsh v. Meager*, 1 *Stark.* 353. But under the new act it has been held, that where the petitioning creditor's debt is proved by the deposition, it is not competent for the defendant to show that the debt was a fraudulent contrivance between the bankrupt and the petitioning creditor. *Young v. Timmins*, 1 *Crom. and Jer.* 148. To make the proceedings evidence, it must be shown that they came out of the custody of the solicitor to the

commission, or the handwriting of the commissioners must be proved; *Collinson v. Hillear*, 3 *Campb.* 30; for which purpose the bankrupt himself, having obtained his certificate and released the surplus, is a competent witness. *Morgan v. Pryor*, 2 *B. and C.* 14. As to producing the proceedings, *vide ante*, *p.* 81. It is only in actions or suits brought by the bankrupt's own assignees, for a debt or demand for which *he* might have sued, that the depositions are made evidence, and therefore if the assignees of another bankrupt are petitioning creditors, and notice of disputing the petitioning creditor's debt is given, the depositions under the latter commission are not made evidence by this section. *Muskett v. Drummond*, 10 *B. and C.* 153. *See Skaife v. Howard*, 2 *B. and C.* 360, *post*, *p.* 535.

By 6 Geo. 4, c. 16, s. 90, it is enacted, that in any action by, or against, any assignee, or in any action against any commissioner, or person acting under the warrant of the commissioners, for any thing done as such commissioner, or under such warrant, no proof shall be required, at the trial, of the petitioning creditor's debt or debts, or of the trading, or act or acts of bankruptcy, respectively, unless the other party in such action shall, if defendant, at or before pleading, and if plaintiff, before issue joined, give notice in writing to such assignee, commissioner, or other person, that he intends to dispute some, and which of such matters, and in case such notice shall have been given, the judge may certify that the matter has been proved or admitted, which shall entitle the party to costs.

The judge, on the reference of a cause before trial, cannot certify. *Barthrop v. Anderton*, 8 *Bingh.* 268. Notice to dispute "the bankruptcy" is too general. It must specify which of the three matters, trading, petitioning creditor's debt, and act of bankruptcy, is intended to be disputed. *Trimley v. Unwin*, 6 *B. and C.* 537. Under this section no proof whatever of the petitioning creditor's debt, trading, or act of bankruptcy, is required, unless proper notice has been given. And where, in an action by a bankrupt against his assignees, no notice having been given by the former of disputing his bankruptcy, the assignees unnecessarily put in the proceedings under the commission, and an objection was taken to the petitioning creditor's debt, apparent on the face of the deposition, it was held that such an objection could not be sustained. *M'Beath v. Coates*, 12 *B. Moore*, 122, *misreported*, 4 *Bingh.* 34. *Bevan v. Lewis*, 1 *Simons*, 376. Where the bankrupt was within the United Kingdom at the time of the issuing of the commission, and has given no notice to dispute the commission, the effect of the above clause is, that in cases where the bankrupt, if solvent, could have sued, and the defendant gives notice of his intention to dispute the bankruptcy, &c., the fact so disputed must be proved, but the depositions under the commis-

sion are conclusive evidence of the matters contained in them. *Earith v. Schroder, M. and M.* 26. *Eden*, 370.

Where notice has been given only to dispute the act of bankruptcy, and the other side have read the depositions on the file to prove the trading and debt, the residue of the proceedings are not considered to be in evidence, and the counsel of the party contesting the commission has no right to inspect them. *Black v. Thorne*, 4 *Campb.* 191. *Stafford v. Clarke*, 1 *C. and P.* 26. The notice is not part of the defendant's evidence in the cause, but may be proved at the commencement of the plaintiff's case, and will immediately put him upon strict proof. *Decharme v. Lane*, 2 *Campb.* 323.

By statute 2 and 3 Wm. 4, c. 114, s. 7, it is enacted, that in the event of the death of any of the witnesses deposing to the petitioning creditor's debt, trading, or act of bankruptcy, under any commission or fiat already issued or hereafter to be issued, it shall be lawful for the assignees appointed under such commission or fiat, and for all persons claiming through or under them, or acting by or under their authority, in the cases hereafter mentioned, to produce and read in evidence in all courts of civil judicature, and in all civil proceedings, in maintenance and support of such commission or fiat, any deposition of such deceased witness relative to such petitioning creditor's debt, trading, or act of bankruptcy, which shall have been duly entered of record pursuant to the provisions of the said recited acts or of this act; and the production or reading of such depositions, or of any copy thereof, duly authenticated according to the provisions of the said recited acts or of this act, shall have the same effect as if the matters alleged therein had been deposed to by the same witness in such court, according to the ordinary course and practice thereof; provided always, that the beforementioned depositions shall be read in evidence in such cases only when the party using the same shall claim, maintain, or defend some right, title, interest, claim, or demand which the bankrupt might have claimed, maintained, or defended, in case no commission of bankrupt or fiat had issued, and shall not be read in evidence in any action or proceeding now pending, by which the validity of any commission or fiat is or may be brought into question.

Evidence of bankruptcy under 6 *Geo.* 4, *c.* 16, *s.* 90, 92—*service of notice.*] A notice served by delivering it to a clerk at the defendant's counting-house, before issue joined, without showing that it has come to the defendant's hands, has been held rightly served. *Widger v. Browning, M. and M.* 27, 2 *C. and P.* 523, *S. C.* If no notice has been delivered with the plea, and the plea is got back, under a false pretence, and redelivered with a notice, it seems to be insufficient.

Lawrence v. *Crowder*, 1 *Moore and P.* 511, 3 *C. and P.* 229, *S. C.* *See also Folks* v. *Scudder*, 3 *C. and P.* 232. Service on the attorney is sufficient. *Howard* v. *Ramsbottom*, 3 *Taunt.* 526.

Strict proof of title.] Strict proof of the title of the assignees has been dispensed with, in cases where the defendant's conduct has been an express or implied admission of their title. *Eden*, 354. *Maltby* v. *Christie*, 1 *Esp.* 340. *Watson* v. *Wace*, 5 *B. and C.* 153. *Rankin* v. *Horner*, 16 *East*, 191, *stated ante, p.* 38. Thus, where the defendant had attended a meeting of the commissioners, and exhibited an account between him and the bankrupt, and afterwards made a part payment to the assignee on that account, it was held to be *primâ facie* evidence that the plaintiff was assignee. *Dickenson* v. *Coward*, 1 *B. and A.* 677. So where the defendant, on being applied to by the assignee, said he would call and pay the money, this was held to dispense with the usual proofs of the assignee's title. *Pope* v. *Monk*, 2 *C. and P.* 112. And an affidavit that a party is indebted to the deponent in the sum of 100*l.* and upwards, and is become bankrupt, is, as against the deponent, conclusive evidence of the bankruptcy. *Ledbetter* v. *Salt*, 4 *Bingh.* 623, 1 *M. and P.* 597, *S. C.*, *and see supra.* Evidence of an admission of the title of the plaintiffs, as assignees, is sufficient, under a plea denying that title. *Inglis* v. *Spence*, 1 *Crom. M. and R.* 432.

Where the assignees are strangers to the record, and their title comes in incidentally, it must be strictly proved, in the regular manner. *Doe* v. *Liston*, 4 *Taunt.* 741. But if parties to the record, though not named assignees, the proceedings will be sufficient evidence, unless notice has been given, if the other party is aware that they make title under the commission. *Simmonds* v. *Knight*, 3 *Campb.* 251, *Rowe* v. *Lant*, *Gow*, 24. *Newport* v. *Hollings*, 3 *C. and P.* 223. So, though there are other defendants on the record, if these defendants have justified as servants of the assignees. *Gilman* v. *Cousins*, 2 *Stark.* 182.

Strict proof of title, what constitutes.] Strict proof of the plaintiffs' title as assignees requires evidence, 1, Of the petitioning creditor's debt; 2, Of the trading; 3, Of the act of bankruptcy; 4, Of the commission; and 5, Of the assignment.

Evidence of petitioning creditor's debt, nature of, and when accrued.] The petitioning creditor's debt must be proved in the same manner as in an action against the bankrupt himself; *per Buller, J., Abbott* v. *Plumbe*, 1 *Dougl.* 217; and, therefore, where the debt arises on a bond, an acknowledgment of

the debt by the obligor will not supersede the necessity of calling the attesting witness. *Abbott v. Plumbe*, 1 *Dougl.* 216. It must appear that the debt was in existence at the time of the act of bankruptcy. *Clarke v. Askew*, 1 *Stark.* 458 (*n*). So where the petitioning creditor's debt arises on a promissory note, dated before the bankruptcy, the note, it has been said, must be proved to have existed prior to the act of bankruptcy, for the date is not even *primâ facie* evidence of that fact, 2 *Stark. Ev.* 161, where it is said that the contrary was held in *Taylor v. Kinloch*, 1 *Stark.* 175, upon a mistaken report of a case cited from memory. *See* 2 *Stark.* 594. But where a note was proved to be in existence *before the docket was struck*, and it bore date on the face of it *before the act of bankruptcy*, this evidence was considered as *primâ facie* proof that the note was in existence before the act of bankruptcy. *Obbard v. Betham, M. and M.* 486. *See Hunt v. Massey*, 3 *Nev. and M.* 109, *ante, p.* 17. So, if it can be shown that about the date of the bills goods were sold of corresponding amount. *Cowie v. Harris, M. and M.* 141. So, where the petitioning creditor is the indorsee of a bill, the indorsement must be proved to have been made before the commission issued, and the date of the bill affords no presumption as to the time of the indorsement. *Rose v. Rowcroft*, 4 *Campb.* 245. If the debt be proved to have existed before the act of bankruptcy, its continued existence up to the act will be presumed. *Jackson v. Irvin*, 2 *Campb.* 50. Unless there have been intermediate transactions. *Gresly v. Price*, 2 *C. and P.* 48.

It must appear that the debt was contracted while the party was a trader, or, if contracted before, was *subsisting* while he was a trader. *Meggott v. Mills*, 1 *Ld. Raym.* 286. *Heanny v. Birch*, 3 *Campb.* 234. *Butcher v. Easto*, 1 *Dougl.* 295.

Where a person contracted a debt, and afterwards became a trader, and the debt still remaining unpaid, he went out of trade, and afterwards committed an act of bankruptcy, a commission, founded on this debt and act of bankruptcy, was held to be valid. *Baillie v. Grant*, 1 *Clark and F.* 238.

If there was a petitioning creditor's debt at the time of the act of bankruptcy, on which a commission might have issued, and there was a petitioning creditor's debt still existing at the time of the commission, it does not signify what happened in the interim, as to the payment of the first debt, the balance throughout continuing sufficient for a petitioning creditor's debt. *Shaw v. Harvey, M. and M.* 526.

Taking a security of a higher nature, after the act of bankruptcy, for a debt of an inferior nature, contracted before, will not prevent the original debt being a good petitioning creditor's debt. *Ambrose v. Clendon*, 2 *Str.* 1042. Nor will the fact that the debtor has become insolvent, and included the debt in his schedule. *Jellis v. Mountford*, 4 *B. and A.* 256.

Ex parte Shuttleworth, 2 *Glynn and J.* 68. And a debt upon an attorney's bill, not signed and delivered according to the statute, is sufficient. *Ex parte Sutton*, 11 *Ves.* 163. *Ex parte Howell*, 1 *Rose*, 312. But a verdict for damages, in an action for breach of promise of marriage, does not, before judgment, constitute a debt; *ex parte Charles*, 14 *East*, 197, and where the debtor is taken in execution, there is no good debt to support a commission. *Cohen v. Cunningham*, 8 *T. R.* 123. Taxed costs upon a judgment as in case of a nonsuit, under a rule of court, do not constitute a good petitioning creditor's debt, being recoverable only by attachment. *Ex parte Stevenson*, *Mon. and Mac.* 263. Though it has been held in several cases that a debt, barred by the statute of limitations, is sufficient to support a commission, unless, perhaps, where the objection is taken by the bankrupt himself, *Swayne v. Wallenger*. 2 *Str.* 746, *Quantock v. England*, 5 *Burr.* 2628, *Fowler v. Browne*, *Co. B. L.* 18, *Mavor v. Pyne*, 3 *Bingh.* 285, 2 *C. and P.* 91, *S. C.*, yet *the proof* of such a debt has been disallowed. *Ex parte Dewdney*, *ex parte Seaman*, 15 *Ves.* 498. *ex parte Roffey*, 19 *Ves.* 468, 2 *Rose*, 245, *and see Gregory v. Hurril*, 5 *B. and C.* 341. The debt must be a legal one, and therefore a promissory note, made in violation of the statutes for the protection of the Bank of England, cannot be proved; *ex parte Randleson*, *Mon. and Mac.* 86; nor, consequently, form a petitioning creditor's debt.

In case of a partnership, where there has been an account rendered, and a balance struck, it will support a commission. and where A. advanced 200*l.* to B. to set up trade, and it was agreed that A. should have one-eighth of the profits, it was held that this advance formed a good petitioning creditor's debt. *Ex parte Notley*, 1 *Mont. and Ayr.* 46.

Where there is only one petitioning creditor, there must be a debt due to him separately, for which he alone might maintain an action at law, and therefore a commission cannot be supported on the petition of one of two partners, to whom a joint debt is due. *Buckland v. Newsame*, 1 *Taunt.* 477, 1 *Campb.* 474, *S. C.*

Where the petitioning creditor is assignee of another bankrupt, and the debt is due to him in that character, and his title comes incidentally in question, strict evidence of his title as assignee must be given; *Doe v. Liston*, 4 *Taunt.* 741; but where, in an action by an assignee, no notice has been given, under the statute, to dispute the commission, the depositions under the commission are evidence of a debt due to the party, in the character in which he claims it, and no other evidence of the first bankruptcy will in such case be necessary. *Scaife v. Howard*, 2 *B. and C.* 560. *Muskett v. Drummond*, 10 *B. and C.* 153, *ante*, *p.* 531.

Where a new petitioning creditor's debt has been substituted

under 6 Geo. 4, c. 16, s. 18, it is sufficient to prove the petition to the Chancellor for the substitution, the Chancellor's order referring the sufficiency of the debt to the commissioner, and the finding of the commissioner thereon. It is not necessary to produce the Chancellor's order, confirming such finding. *Batchelor v. Vyse*, 1 *Moo. and Rob.* 331.

Evidence of petitioning creditor's debt, amount of.] The debt of the petitioning creditor must amount, if it is to one creditor, or one firm, to 100*l.*, if it is to two, to 150*l.*, if to more, to 200*l.*, 6 Geo. 4, c. 16, s. 15. 100*l.* in notes, bought at 10*s.* apiece, is a sufficient debt. *Ex parte Lee*, 1 *P. Wms.* 782. Where a creditor to the amount of 112*l.*, after notice of an act of bankruptcy, received 50*l.*, it was held, that as that payment was void, there was still a good petitioning creditor's debt. *Mann v. Shepherd*, 6 *T. R.* 79. 1 *Buck*, 283.

Evidence of petitioning creditor's debt—admission of bankrupt.] The admissions of the bankrupt himself are frequently given in evidence to establish the petitioning creditor's debt. Thus, an entry in the bankrupt's books, *Watts v. Thorpe*, 1 *Campb.* 376, or an account signed by him, charging himself, *Hoare v. Coryton*, 4 *Taunt.* 560, is sufficient evidence of the debt, provided it be shown that the entry, or account, was made before the act of bankruptcy. An admission, by the bankrupt, of the debt, made *after* the act of bankruptcy, but before the issuing of the commission, has been decided to be inadmissible. *Smallcombe v. Bruges*, *M'Clel.* 48, 13 *Price*, 136, *S. C.* *Sanderson v. Laferest*, 1 *C. and P.* 46. But where the debt was founded on a bill of exchange, of which the bankrupt was drawer, it was held that the bankrupt's declaration, made after the act of bankruptcy, and before the commission, that the bill would not be paid, was admissible evidence to supply the proof of notice. *Brett v. Levett*, 13 *East*, 213. *M'Clel.* 60. *Robson v. Kemp*, 4 *Esp.* 234. *Dowton v. Cross*, 1 *Esp.* 168.

Evidence of petitioning creditor's debt—bills of exchange, and debts due on credit.] As a bill of exchange is a debt from the date of it, as against the drawer, it is sufficient to constitute a good petitioning creditor's debt, though not indorsed to the creditor till after an act of bankruptcy; *Macarty v. Barrow*, 2 *Str.* 949; *Glaister v. Hewer*, 7 *T. R.* 498; *Anon.* 2 *Wils.* 135; *Eden*, 47; but if the creditor be indorsee, it must appear that the bill was indorsed to him before the commission issued. *Rose v. Rowcroft*, 4 *Campb.* 245. *Ex parte Botter*, 1 *Mont. and B.* 412. By 6 Geo. 4, c. 16, s. 15, every person who has given credit to any trader, upon valuable consideration, for any sum payable at a certain time, which time shall not have arrived when such trader committed an act of bankruptcy,

may petition, or join in petitioning, whether he shall have any security in writing, or otherwise, for such sum, or not. Where A. having drawn a bill for 148*l.* in favour of B., to whom he was previously indebted in that amount, committed an act of bankruptcy before either the bill was due or had been presented for acceptance, it was held that such bill of exchange was a good petitioning creditor's debt, though subsequently to the commission it had been duly presented to and paid by the acceptors. *Ex parte Douthat*, 4 *B. and A.* 67. Where the debt was an acceptance of the bankrupt, and the assignees had had notice to prove the consideration, it was held, that though they were not bound to prove the consideration until impeached, yet that not having adduced any evidence, and the jury, from circumstances of suspicion attached to the case, having found a verdict for the defendant, the court would not disturb that verdict. *Abraham v. George*, 11 *Price*, 423. Where two persons exchange acceptances, and before the bills are mature, one of them commits an act of bankruptcy, there is not such a debt due from him to the other as will sustain a commission, before the other has paid his own acceptance. *Sarratt v. Austin*, 4 *Taunt.* 200. Interest, where not expressed in the body of the bill, cannot be added so as to make up the amount of the debt. *Cameron v. Smith*, 2 *B. and A.* 305. *Ex parte Burgess*, 2 *B. Moore*, 745, 8 *Taunt.* 660, *S. C.* A bill for 100*l.* though not due till after the act of bankruptcy, is a good petitioning creditor's debt to support a commission against the drawer, and the rebate of interest is not to be considered, for it is a present debt to the amount of 100*l.* *Brett v. Levett*, 13 *East*, 213.

Evidence of petitioning creditor's debt—prior act of bankruptcy.] By 6 Geo. 4, c. 16, s. 19, no commission shall be deemed invalid, by reason of any act of bankruptcy prior to the debt of the petitioning creditor, provided there be a sufficient act of bankruptcy subsequent to such debt. Before this statute, though the bankrupt himself could not, yet a debtor to the estate might, in an action by the assignees, upon proof of an act of bankruptcy prior to the petitioning creditor's debt, and of a sufficient debt upon which a commission might be supported, resist the claim and defeat the commission. *Eden*, 43.

Evidence of trading.] By 6 Geo. 4, c. 16, s. 2, it is enacted, that all bankers, brokers, and persons using the trade or profession of a scrivener, receiving other men's monies or estates into their trust or custody, and persons insuring ships, or their freight, or other matters, against perils of the seas; warehousemen, wharfingers, packers, builders, carpenters, shipwrights, victuallers, keepers of inns, taverns, hotels, or coffee-houses,

dyers, printers, bleachers, fullers, calenderers, cattle or sheep salesmen, and all persons using the trade of merchandise by way of bargaining, exchange, bartering, commission, consignment, or otherwise, in gross or by retail, and all persons who, either for themselves, or as agents or factors for others, seek their living by buying and selling, or by buying and letting for hire, or by the workmanship of goods or commodities, shall be deemed traders liable to become bankrupt; provided that no farmer, grazier, common labourer, or workman for hire, receiver-general of the taxes, or member of or subscriber to any incorporated commercial or trading companies established by charter or act of parliament, shall be deemed, as such, a trader liable by virtue of this act to become bankrupt.

Evidence of a trading which ceased before the 6 Geo. 4, c. 16, took effect, will not support a commission of bankrupt issued after that time; *Surtees v. Ellison*, 9 *B. and C.* 750; but evidence of a trading before the statute is admissible to show *quo animo* acts done after the statute were done. *Worth v. Budd*, 2 *B. and Adol.* 173.

The declarations of the bankrupt, made before the bankruptcy, have been admitted to prove the trading, in an action in which the bankrupt was plaintiff. *Parker v. Barker*, 1 *B. and B.* 9. But in an action by the assignees against a third person the propriety of receiving such evidence has been doubted, *Bromley v. King*, *R. and M.* 228. Where the question was as to the intention with which the party had made certain purchases, Abbott, C. J. held that his declarations, at the time of the purchase of the goods, as to the mode in which he intended to dispose of them, were admissible to prove the intention. *Gale v. Halfknight*, 3 *Stark.* 56.

A commission against an infant is void, and not merely voidable. *Belton v. Hodges*, 9 *Bingh.* 365.

Evidence of trading—what persons are traders within the general words of 6 *Geo.* 4, *c.* 16. *s.* 2.] To prove a person a trader, evidence of both buying and selling is necessary. *Eden*, 3. But where it appeared that the party had ordered goods for the purpose, as he stated, of sending them abroad, and he said that he would give other goods in exchange for them, on it being objected that there was no evidence of selling, per Abbott, C. J. "I cannot say that if a man buys, and represents himself as a dealer, and offers goods in exchange, that he does not buy to sell again. At least I must leave it to the jury, I cannot nonsuit upon it." *Millikin v. Brandon*, 1 *C. and P.* 380. The *quantum* of dealing is immaterial. *Patman v. Vaughan*, 1 *T. R.* 572. *Newland v. Bell*, *Holt*, 221. *Gale v. Halfknight*, 3 *Stark.* 56. Thus the purchase of one lot of timber, and the sale of a portion of it, will make a man a trader.

Holroyd v. Gwynne, 2 *Taunt.* 176. But such occasional acts as a schoolmaster selling books to his own scholars only; *Valentine v. Vaughan, Peake*, 76; a colonel of a fencible regiment selling horses occasionally at Tattersall's; *Ex parte Blackmore*, 6 *Ves.* 3; or a person who keeps hounds buying dead horses, and selling the skins and bones; *Summersett v. Jarvis*, 3 *B. and B.* 2, 6 *B. Moore*, 56, *S. C.*, are not evidence of trading. And where a person buys more of an article than he wants, and sells the surplus, he does not thereby become a trader. *See Newland v. Bell, Holt*, 222. So a cowkeeper selling his cows unfit for use. *Carter v. Dean*, 1 *Swans.* 64. So a farmer buying and selling articles incidental to the occupation of his farm, as where a farmer buys pigs, feeds them on his stubbles, and resells them, some after a week, some after longer periods. *Patten v. Browne*, 7 *Taunt.* 409. *Martin v. Nightingale*, 3 *Bingh.* 421. So a livery-stable keeper who buys provender, and sells it to his customers and others. *Cannan v. Donew*, 10 *Bingh.* 292, 3 *Moore and S.* 761, *S. C.*

But where a farmer bought horses unfit for farming, and resold them, and avowed his intention to take out a license and become a horse-dealer, these facts were held to be evidence of trading. *Wright v. Bird*, 1 *Price*, 20. A drawing and redrawing of bills of exchange and promissory notes, if there be a continuation of it with a view to gain a profit on the exchange, is a trafficking in exchange, and trading. *Richardson v. Bradshaw*, 1 *Atk.* 128. *Hankey v. Jones, Cowp.* 745. *Eden*, 4. Where the business of brickmaking is carried on as a mode of enjoying the profits of a real estate, it will not make the party liable to the bankrupt law; and it makes no difference whether the party is a termor, or entitled to the freehold; but where it is carried on substantially and independently as a trade, it will do so. *Eden*, 4, *citing Sutton v. Weeley*, 7 *East*, 442, *ex parte Gallimore*, 2 *Rose*, 424, *ex parte Harrison*, 1 *Br. C. C.* 173, *Parker v. Wills, ib.* (*n*). And in a late case it was ruled, that the owner of land, who makes bricks from the clay of it, and buys chalk for the more convenient burning of the bricks, is not a trader. *Paul v. Dowling, M. and M.* 263. *Heane v. Rogers*, 9 *B. and C.* 577. *Ex parte Burgess*, 2 *Gl. and J* 183. Whether a trader who has ceased to buy, but is selling off his stock, is liable to a commission, depends upon the circumstance whether there be an intention to exercise or resume the trading, which is a question for a jury. *Ex parte Paterson*, 1 *Rose*, 402. *Eden*, 5. If a man has carried on a manufactory, his ceasing actually to work it does not for that reason make him cease to be an object of the bankrupt laws; if he continues to solicit orders, and holds himself out to the world as capable of executing orders in the course of his trade, he continues liable to be made a bankrupt. *Per Ld. Ellenborough, Wharam v. Routledge*, 5 *Esp.* 236. And where a

person was proved to have been a trader by buying and selling fish during one season, Lord Ellenborough said that it must be presumed he still carried on his business in the usual way, and continued a trader down to the time of his bankruptcy. *Heanny v. Birch*, 3 *Campb.* 233. *Paul v. Dowling, M. and M.* 268. Where business had been carried on by one party, in partnership with another, which partnership had been dissolved some years before, and no act of trading had been done for two or three years before the time when the petitioning creditor's debt accrued, but the concerns had not been ultimately wound up, and part of the stock still remained in the warehouse of the parties undisposed of, the jury found, under the direction of the court, that the trading continued. *Executors of Backhouse v. Tarleton, coram Ld. Ellenborough*, 2 *Stark. Ev.* 143. 1*st edit.* An executor disposing of his testator's stock is not a trader, though he purchase other articles to make it marketable; but if he increase the stock, and continue to sell, he becomes a trader. *Ex parte Nutt*, 1 *Atk.* 102. *Ex parte Garland*, 10 *Ves.* 120. *Eden*, 5. Where a testator directs his trade to be carried on after his death, that part of his property only will be liable in case of bankruptcy which he has directed to be embarked in the trade. *Thompson v. Andrews*, 1 *Myl. and K.* 116. An illegal trading will support a commission. *Cobb v. Symonds*, 5 *B. and A.* 516; *but see Milliken v. Brandon*, 1 *C. and P.* 381. Buying and selling land, or any interest in land, is not a trading. *Port v. Turton*, 2 *Wils.* 169.

Under the general statement in the commission that the bankrupt got his living by buying and selling, any species of trading may be given in evidence. *Hale v. Small*, 2 *B. and B.* 25. And where the bankers were described as "bankers being traders according to the statute," it was held that the word bankers might be considered only a description of the person. *Bernasconi v. Farebrother*, 10 *B. and C.* 549.

Evidence of trading—what persons are within the particular words of 6 *Geo.* 4, *c.* 16, *s.* 6.] A pawnbroker is a *broker* within the statute. *Rawlinson v. Pearson*, 5 *B. and A.* 124. So a ship-broker. *Pott v. Turner*, 6 *Bingh.* 702, 4 *Moore and P.* 551, *S. C.* Whether an insurance broker be within the same term has not been determined. *Ex parte Stevens*, 4 *Madd.* 256. *See Pott v. Turner*, 6 *Bingh.* 708. It seems probable that whenever it becomes necessary to determine the point, it will be resolved in the affirmative. *Eden*, 7. In order to make a man a *money scrivener*, it must be an occupation to which he resorts in order to gain his living. In the course of this occupation he must receive other men's monies into his trust or custody. He must carry on the business of being trusted with other people's monies, to lay out for them as oc-

casion offers. *Per Gibbs, C. J. Adams v. Malkin*, 3 *Campb.* 534. *Ex parte Paterson*, 1 *Rose*, 402. The keeper of a private lodging-house, who buys provisions for his lodgers and charges a profit, is "an hotel-keeeper" within the above section. *Smith v. Scott*. 9 *Bingh*. 14.

Evidence of act of bankruptcy.] By 6 Geo. 4, c. 16, s. 3, it is enacted, that if any such trader (*vide supra*) shall depart this realm, or being out of this realm shall remain abroad, or depart from his dwelling-house, or otherwise absent himself, or begin to keep his house, or suffer himself to be arrested for any debt not due, or yield himself to prison, or suffer himself to be outlawed, or procure himself to be arrested, or his goods, money, or chattels, to be attached, sequestrated, or taken in execution, or make, or cause to be made, either within this realm or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels, or make, or cause to be made, any fraudulent surrender of any of his copyhold lands or tenements, or make, or cause to be made, any fraudulent gift, delivery, or transfer of any of his goods or chattels, every such trader doing, suffering, procuring, executing, permitting, making, or causing to be made, any of the acts, deeds, or matters aforesaid, with intent to defeat or delay his creditors, shall be deemed to have thereby committed an act of bankruptcy.

And by section 4 it is enacted, that where any such trader shall execute any conveyance or assignment by deed, to a trustee or trustees, of all his estate and effects, for the benefit of all the creditors of such trader, the execution of such deed shall not be deemed an act of bankruptcy, unless a commission issue against such trader within six calendar months from the execution thereof by such trader; provided that such deed shall be executed by every such trustee within fifteen days after the execution thereof by the said trader; and that the execution by such trader, and by every such trustee, be attested by an attorney or solicitor, and that notice be given within two months after the execution thereof by such trader, in case such trader reside in London, or within forty miles thereof, in the London Gazette, and also in two London daily newspapers; and in case such trader does not reside within forty miles of London, then in the London Gazette, and also in one London daily newspaper, and one provincial newspaper, published near to such trader's residence; and such notice shall contain the date and execution of such deed, and the name and place of abode respectively of every such trustee, and of such attorney or solicitor.

And by section 5 it is enacted, that if any such trader, having been arrested or committed to prison for debt, or on any attachment for non-payment of money, shall upon such, or any

other arrest or commitment for debt, or non-payment of money, or upon any detention for debt, lie in prison for twenty-one days; or having been arrested or committed to prison for any other cause, shall lie in prison for twenty-one days after any detainer for debt lodged against him and not discharged, every such trader shall be deemed to have thereby committed an act of bankruptcy; or if any such trader having been arrested, committed, or detained for debt, shall escape out of prison or custody, every such trader shall be deemed to have thereby committed an act of bankruptcy, from the time of such arrest, commitment, or detention.

And by section 6 it is enacted, that if any such trader shall file, in the office of the Lord Chancellor's secretary of bankrupts, a declaration in writing signed by such trader, and attested by an attorney or solicitor, that he is insolvent or unable to meet his engagements, the said secretary of bankrupts, or his deputy, shall sign a memorandum that such declaration hath been filed, which memorandum shall be authority for the printer of the London Gazette to insert an advertisement of such declaration therein; and every such declaration shall, after such advertisement inserted as aforesaid, be an act of bankruptcy committed by such trader at the time, when such declaration was filed, but no commission shall issue thereupon, unless it be sued out within two calendar months next after the insertion of such advertisement, and unless such advertisement shall have been inserted in the London Gazette within eight days after such declaration was filed. By the same section, the Gazette containing such advertisement shall be evidence to be received of such declaration having been filed. And, by section 7, the declaration having been concerted between the bankrupt and any creditor, or other person, shall not invalidate the commission.

By section 8, a trader, after a docket struck against him, compounding with the person who struck the same, whereby such person may receive more in the pound than the other creditors, is guilty of an act of bankruptcy. By section 9, traders having privilege of parliament, committing any of the aforesaid acts of bankruptcy, may be proceeded against as other traders, though not subject to arrest or imprisonment. By section 10, a trader having privilege of parliament, not paying or compounding to the satisfaction of his creditor, and also entering an appearance to the action within one month, is guilty of an act of bankruptcy. And by section 11, a trader having privilege of parliament, disobeying the order of any court of equity, or in bankruptcy, or lunacy, for payment of money, after service, and peremptory day fixed, is guilty of an act of bankruptcy.

The most important decisions with regard to the acts of bankruptcy above enumerated will now be noticed.

Evidence of act of bankruptcy—departing the realm.] It must be shown that the trader departed the realm *with intent* to delay his creditors, and therefore, though the creditors be in fact delayed, yet if the intent is wanting, there is no act of bankruptcy. *Warner v. Barber, Holt*, 175. *Windham v. Paterson*, 1 *Stark.* 145. But where the departing the realm must necessarily cause a delay, it will be an act of bankruptcy, for a person may be supposed to foresee and to intend what is the necessary consequence of his own acts. *Ramsbottom v. Lewis*, 1 *Campb.* 280. Therefore where a trader went abroad in consequence of having killed his wife, it was held an act of bankruptcy. *Woodier's case, B. N.P.* 39; *and see Raikes v. Poreau, Vernon v. Hankey, Co. B. L.* 111. Where a trader departed the realm, leaving a letter behind him, and on the following day wrote another letter from Calais, it was held that both letters were admissible to show with what intention he departed; and *per Best, C. J.*, the declarations, in order to be admissible, must be made, or the letters written, at the time of the act in question; but it is sufficient if they are written at any time during the continuance of the act; the departing the realm is a continuing act, and these letters were written during its continuance. *Rawson v. Haigh*, 2 *Bingh.* 99. *Maylin v. Eyloe*, 2 *Str.* 809. *Lees v. Marton*, 1 *Moo. and Rob.* 211, *post p.* 544. Going to Ireland is a departing the realm. *Williams v. Nunn*, 1 *Taunt.* 270.

Evidence of act of bankruptcy—departing from his dwelling-house.] Notwithstanding a decision to the contrary, *Barnard v. Vaughan*, 8 *T. R.* 149, it is now settled that actual delay need not be proved, *an intent* to delay being sufficient. *Wilson v. Norman*, 1 *Esp.* 334. *Hammond v. Hicks*, 5 *Esp.* 139. *Holroyd v. Whitehead*, 3 *Campb.* 530. *Eden*, 18. *Robertson v. Liddell*, 9 *East*, 487. Even where a trader departed under a mistaken idea that an officer who called had a writ for him, it was held an act of bankruptcy. *Ex parte Bamford*, 15 *Ves.* 449. Where the act of departing is equivocal, it is a question for the jury whether it was with intent to delay creditors; as where two partners left their shop, stating their purpose to be to get some bills discounted, and telling their shopman if any creditor called, to make an excuse. In this case the jury found the intent, no evidence being given of an attempt to discount the bills. *Deffle v. Desanges*, 8 *Taunt.* 671. *Aldridge v. Ireland, cited* 1 *Taunt.* 273. A trader who has no settled house, or counting-house, but takes up a temporary abode at a public-house in the place to which his business carries him, commits an act of bankruptcy by departing from such public-house, with intent to delay his creditors. *Holroyd v. Gwynne*, 2 *Taunt.* 176.

In order to prove the intent with which the bankrupt de-

parted from his dwelling-house, evidence of what he said is admissible as part of the *res gestæ*. *Ambrose v. Clendon, Ca. temp. Hardw.* 267. But it must be shown that the declaration was made at the time of the act, or at all events so near it as to form part or one and the same transaction. Thus a deposition stating that the bankrupt had admitted that he had absented himself for the purpose of avoiding his creditors, but not stating the time of the admission, was held to be no evidence of an act of bankruptcy. *Marsh v. Meager*, 1 *Stark*. 353. So it was held by Lord Ellenborough, that conversations taking place subsequently to the commission of the act constituting the act of bankruptcy, were inadmissible. *Robson v. Kemp*, 4 *Esp*. 234. In one case it was held that the declarations of the bankrupt *after his return home*, as to the reason of his absence, ought to have been admitted; *Bateman v. Bailey*, 5 *T. R*. 512, *and see Maylin v. Eyloe*, 2 *Str*. 809, *Rawson v. Haigh*, 2 *Bingh*. 99, *supra*; but the correctness of this decision has been doubted. *See* 2 *Evans's Pothier*, 285, *Eden*, 360, 2 *Phill. Ev*. 339, *Smallcombe v. Bridges, M'Clel*, 45. Such evidence was however admitted by Parke, J., in *Newman v. Stretch, M. and M*. 338. *See Ridley v. Gyde*, 9 *Bingh*. 349. *Ex parte Palmer*, 1 *Deacon and Chitty*, 373. But in *Lees v. Marton*, 1 *Moody and Robinson*, 211, Parke, J., said, that unless the declaration could be proved to have been made by the bankrupt whilst he was absenting himself, or immediately after his return, it could not be admitted as part of the *res gestæ*. The declaration of the bankrupt that he departed to avoid a writ is evidence of an act of bankruptcy, without proof of the writ, the debt, or the existence of creditors. *M. and M*. 338.

In a late case declarations made by the bankrupt *before* leaving his house were admitted. Being in embarrassed circumstances he absented himself from the 16th of February till the 9th of March. On an issue whether he had committed an act of bankruptcy before the 5th of March, two letters, written by him on the 16th of January preceding, asking for time upon two bills of exchange, payable by him in February, were admitted to show the motives of his absence. *Smith v. Cramer*, 1 *Bingh. N. C*. 585.

Evidence of act of bankruptcy—otherwise absent himself.] It has been held sufficient evidence of the trader absenting himself to show, that after being arrested he fled from the officer into the house of another person where the door was fastened, and the officer not permitted to enter, and that he said he remained there for fear of other creditors. *Bayley v. Schofield*, 1 *Maule and S*. 338. So where the trader went into the back shop of a neighbour's house to avoid an officer, who, he said, had a writ against him. *Chenoweth v. Hay, Id*. 676, *and see Wilson*

v. Norman, 1 *Esp.* 334. And again, where a trader left his counting-house (to which he never returned) taking away his books with him, and went to his country-house, where he slept two or three nights afterwards, he was held to have committed an act of bankruptcy. *Judine v. Da Cossen*, 1 *Bos. and Pul. N. R.* 234. So where there were two partners, one of whom resided in Manchester and the other in London, and the London partner having left his house without intent to delay his creditors, and having been a few days on a visit at Manchester, both of them left their counting-house there, to avoid an arrest, carrying with them their books of accounts, this was held an act of bankruptcy. *Spencer v. Billing*, 3 *Campb.* 312. And where a trader abstained from going to a place to make an inquiry as to an execution against him, to which he would have gone but for fear of arrest, this was held to be "an absenting himself." *Robson v. Rolls*, 9 *Bingh*. 648. According to the decisions "absenting himself" has hitherto been confined to the case of a party absenting himself from his own regular place of business, at which a man would be expected to be, or from one or more particular creditors at some other place. *Per Cur. Bernasconi v. Farebrother*, 10 *B. and C.* 556. No case has yet gone the length of deciding that where the appointment is to meet the creditor at his (the creditor's) place of residence, and the debtor breaks that appointment, such conduct amounts to an act of bankruptcy. *Per Parke, J., Lees v. Marton*, 1 *Moody and Robinson*, 212 ; *sed vide Robson v. Rolls*, 9 *Bingh*. 648. 10 *B. and C.* 556. Where a trader, who was in the habit of attending the Royal Exchange, left it on seeing one of his creditors whom he had appointed to meet there, desiring a friend to say he was not there, it was held an act of bankruptcy. *Gillingham v. Laing*, 6 *Taunt.* 532. But where a trader who, on being arrested, had obtained his liberty upon a promise to attend and execute a bail-bond, did not attend, it was held not an act of bankruptcy. *Schooling v. Lee*, 3 *Stark.* 149. With regard to a mere failure to keep an appointment with a creditor, the authorities do not agree ; in *Tucker v. Jones*, 2 *Bingh*. 2, 9 *B. Moore*, 24, *S. C.*, the court of Common Pleas considering it not an act of bankruptcy, while in a later case the Master of the Rolls expressed a contrary opinion. *Robinson v. Carrington*, 1 *Mont. and Ayr.* 12. It is in fact a question depending on *intention*. *See Ex parte Lavender*, 2 *Mont. and Ayr.* 11. Where the trader was informed by the attorney of the petitioning creditor that he had delivered a warrant to arrest him to an officer, and was advised by him to repair to his office to avoid a public arrest, which the trader did, it was held no act of bankruptcy. *Mills v. Elton*, 3 *Price*, 142. It is immaterial whether a creditor was actually delayed or not. *Chenoweth v. Hay*, 1 *Maule and S.* 676.

Evidence of act of bankruptcy—begin to keep his house.] It was formerly thought that in order to prove a beginning to keep house, with intent to delay creditors, an actual denial of a creditor must be proved; *Garret v. Moule*, 5 *T. R.* 575, but it is now settled that such actual denial is only one mode of proof by which the act of bankruptcy may be established, and that it may be proved by any other evidence to the same effect. *Dudley v. Vaughan*, 1 *Campb.* 271. *Robertson v. Liddell*, 9 *East*, 487. *Lloyd v. Heathcote*, 2 *B. and B.* 388, 5 *B. Moore*, 129, *S. C.* Where a trader withdraws from his counting-house on the ground floor, to his parlour up stairs, for privacy and seclusion, and with a view to avoid the fair importunity and personal solicitation of his creditors, it is an act of bankruptcy. *Dudley v. Vaughan*, 1 *Campb.* 271, *and see R. v. Bebb*, *cited* 1 *Maule and S.* 354, *Key v. Shaw*, 8 *Bingh.* 321. Where the partners in a banking-house reside in the same place in which the bank is situated, and they close the windows and shutters of the bank, this is "a beginning to keep house." *Cumming v. Bailey*, 6 *Bingh.* 363. But it is not an act of bankruptcy in those partners who are not resident in the same place. *Mills v. Bennett*, 2 *Maule and S.* 556. *Ex parte Mavor*, 19 *Ves.* 543. *Hawkins v. Whitten*, 10 *B. and C.* 217. A mere direction given by a trader to deny him, is not an act of bankruptcy, unless that direction be followed by an actual denial, or by his concealing himself, or by some other act which is evidence of a beginning to keep house. *Fisher v. Boucher*, 10 *B. and C.* 705. *See Lloyd v. Heathcote*, 2 *B. and B.* 388, 5 *B. Moore*, 129. And where a trader, having been arrested on the 20th of May, desired his servants not to let into the house any persons whom they did not know, and, on the morning of the 21st, the doors of the house were kept shut, and no person was admitted without it being ascertained from the window who he was, it was held an act of bankruptcy, though no creditor was actually denied. *Harvey v. Ramsbottom*, 1 *B. and C.* 55. If a trader secretes himself in the house of a friend, where he is lodging, and where persons are in the habit of calling upon him, it is an act of bankruptcy. *Curteis v. Willis*, 1 *R. and M.* 58, 4 *D. and R.* 224, *S. C.* And though the trader was seen by the creditor at the time of the denial, it is still an act of bankruptcy. *Ex parte Bamford*, 15 *Ves.* 451. Where a trader gives a general order to be denied, and is denied to a particular creditor, it is such a beginning to keep house as will constitute an act of bankruptcy, although the trader immediately overtakes the creditor, and tells him that he is not afraid of him but of another creditor. *Mucklow v. May*, 1 *Taunt.* 479, *and see Colkett v. Freeman*, 2 *T. R.* 59. It must be proved that the order to deny was given by the trader. *Dudley v. Vaughan*, 1 *Campb.* 271. *Ex parte Foster*, 17 *Ves.* 416. But if a trader in his own

house hears himself denied to a creditor, and does not come forward, this, if done with an intent to delay creditors, is an act of bankruptcy, though he has given no directions to be denied. *Smith v. Moon, M. and M.* 458.

In answer to this general evidence of denial it may be shown that the order was not given with intent to delay, as that it was to deny the trader to any one who should come whilst he was at dinner, or engaged in business. *Shew v. Thompson, Holt*, 159. *Lloyd v. Heathcote*, 2 *B. and B.* 392. A simple denial to a creditor is not enough to make a trader a bankrupt; he may not only order himself to be denied at unseasonable hours in the night, but in the course of the day, when he is taking his meals, and on other occasions, which may be easily imagined, he may refuse to see his creditors without meaning to delay them, and therefore, without committing an act of bankruptcy, although they should for a time be delayed. *Per Lord Ellenborough, Smith v. Currie*, 3 *Campb.* 350. So a denial on a Sunday. *Ex parte Preston*, 2 *V. and B.* 312. But where a trader ordered his servant to say, if any creditors called, that he was not at home, and he was accordingly denied, being ill in bed at the time, it was held that it was properly left to the jury whether this was an act of bankruptcy, and that they were warranted in finding it so. The creditor should have been informed that the trader was at home but ill. *Lazarus v. Waithman*, 5 *B. Moore*, 313.

Evidence of act of bankruptcy—fraudulent conveyance, &c.] By the 6 Geo. 4 (sec. 3) two descriptions of fraudulent transactions are made acts of bankruptcy, viz. *any fraudulent grant, or conveyance, of any of the trader's lands, tenements, goods, or chattels*, and also *any fraudulent gift, delivery, or transfer, of any of his goods or chattels, ante p.* 541. A bill of exchange is a chattel within the above section. *Cumming v. Baily*, 6 *Bingh.* 363. A fraudulent delivery of goods will not be an act of bankruptcy, unless it is in the nature of a gift or transfer, so that where goods are removed with intent to delay a creditor, but the party in whose custody they are placed has no claim given to him over them, this is not an act of bankruptcy. *Cotton v. James, M. and M.* 273. As all the acts which have heretofore been determined to be fraudulent preferences will, under the latter of these provisions, be henceforth considered as acts of bankruptcy, and as all the doctrine applicable to fraudulent preference by deed attaches likewise to all fraudulent preferences, it will be most convenient to consider them together. *Eden*, 25. A creditor who has executed, or been privy to, or acted under the fraudulent deed, cannot set it up as an act of bankruptcy. *Bamford v. Baron*, 2 *T. R.* 594 (*n*). *Jackson v. Irvin*, 2 *Campb.* 49. *Back v. Gooch, Holt*, 13. *Tope v. Hockin*, 7 *B. and C.* 101.

Evidence of act of bankruptcy—fraudulent conveyance, &c.—deeds fraudulent at common law or under stat. 13 *Eliz. c.* 5.] A grant, or conveyance, may be void, either under the statute 13 Eliz. c. 5, or at common law, or as being contrary to the policy of the bankrupt laws. The facts necessary to be proved in order to establish fraud, so as to avoid a deed at common law, will be stated hereafter. *See post, "Actions against Sheriffs," and Index, title "Fraud."*

Evidence of act of bankruptcy—fraudulent conveyance, &c.—deeds, &c. fraudulent as contrary to the policy of the bankrupt law.] The cases formerly decided relative to assignments *by deed* of all a trader's property, will now, under the latter of the clauses above-mentioned, be applicable to all assignments, whether under seal or not. The assignment of *all* a trader's property, whether upon trust for the benefit of one creditor, *Wilson v. Day*, 2 *Burr.* 827, or of several, *Compton v. Bedford*, 1 *W. Bl.* 362, or of all to the exclusion of one, *Ex parte Foord*, *cited* 1 *Burr.* 477, is an act of bankruptcy. And it is immaterial that in fact the trader has no intent to delay or defeat his creditors. *Stewart v. Moody*, 1 *Crom. M. and R.* 777. Where a trader conveyed the whole of his property to a creditor, upon trust, to satisfy his debt, and to pay over the surplus, if any, to the trader, who then knew himself to be insolvent, it was held an act of bankruptcy, and that such conveyance was invalid, though the bill of sale was given by the trader, when under arrest, at the suit of the particular creditor for a just debt. *Newton v. Chantler*, 7 *East*, 138. So where A., a trader, conveyed *all* his effects (of which he remained in possession) as a security to B., a banker, who had agreed to honour his drafts, subject to a defeasance, on A.'s paying such sums as B. advanced, with a covenant that on A. failing to perform his part, B. should take possession of the effects, the conveyance was held fraudulent. *Worseley v. Demattos*, 1 *Burr.* 467. So where a trader, being in distressed circumstances, assigned all his estate to a creditor, as a security for an unliquidated sum, without delivering possession, the assignment was held fraudulent. *Wilson v. Day*, 2 *Burr.* 827. In the two last cases, the assignment appears to be fraudulent on three grounds: 1, As an undue preference of the particular creditor in contemplation of bankruptcy; 2, As contrary to the policy of the bankrupt law, being an assignment of *all* the trader's property, whereby he was disabled from carrying on his trade; and 3, At common law; the want of transfer of the possession being evidence of the fraud.

An assignment of *all* a trader's effects, even upon trust for the benefit of all his creditors, has been held to be an act of bankruptcy, on the ground, first, that the trader necessarily deprives himself, by such an act, of the power of carrying on

his trade, and, secondly, that he endeavours to put his property under a course of application and distribution among his creditors different from that which would take place under the bankrupt law. *Dutton v. Morrison*, 17 *Ves.* 199. It has been held that such an assignment is an act of bankruptcy, though none of the creditors have executed it, and though it has never been acted upon, or out of the trader's possession. *Botcherby v. Lancaster*, 1 *Ad. and Ell.* 77, 3 *Nev. & M.* 383, *S. C.* In general, an assignment of so much of a man's stock as disables him from carrying on his business, is an act of bankruptcy. *Hooper v. Smith*, 1 *W. Bl.* 442. But it is incumbent on the party who sets up the act of bankruptcy, to show that the assignment will have the effect of preventing the trader from carrying on his business, by giving evidence of the general estate of his affairs at the time. It is not sufficient to prove that, under pecuniary pressure, he parted with some articles essential to the carrying on of his business; as where a miller transferred his waggon and horses to a creditor who had arrested him. *Wedge v. Newlyn*, 4 *B. & Ad.* 831. A colourable exception of a small portion of the property will not prevent the assignment from operating as an act of bankruptcy. Thus, where the assignment was made for the benefit of several creditors, of all the trader's goods and stock in trade (some few particulars excepted, to the amount of about 100*l.*), and the deed was executed at midnight, and the trader absconded next morning, the deed was held void, the interest omitted being too minute to make a difference. *Compton v. Bedford*, 1 *W. Bl.* 362. So where the trader assigned all his effects, goods, stock in trade, and book debts (except household goods, watches, plate, bills of exchange, inland bills, and promissory notes, and cash then by him, and also except a large parcel of ginger), the exception was considered colourable, and Lord Hardwicke was clear that the deed was an act of bankruptcy. *Ex parte Foord, cited* 1 *Burr.* 477, *see Berney v. Davison*, 1 *B. and B.* 408, *Berney v. Vyner*, *Id.* 482. So an assignment of all a trader's stock in trade (but not of his household goods and debts, both of which were very trifling) has been held an act of bankruptcy. *Law v. Skinner*, 2 *W. Bl.* 996.

But a distinction is to be observed between an assignment by a trader of *all* his effects, *for the benefit of his creditors*, or for securing a pre-existing debt, and an assignment of all his property for a valuable consideration, the latter not being fraudulent. Thus it is said by Lord Kenyon, that all the cases, without a single exception, where the assignment of his property by a trader had been deemed fraudulent and an act of bankruptcy, had been where it had been given for a by-gone and before-contracted debt; but that it never could be taken to be law that a trader could not sell his property when his affairs become embarrassed, or assign them to a person who

would assist him in his difficulties as a security for any advances such person might make to him. *Whitwell v. Thompson*, 1 *Esp.* 72, *and see Manton v. Moore*, 7 *T. R.* 67. *Hunt v. Mortimer*, 10 *B. and C.* 44. So it has been held that a sale to a *bonâ fide* purchaser of the *whole* of a trader's stock in trade, the trader intending to abscond with the money, and to defraud his creditors, is not an act of bankruptcy, for the trader receives in return a fund of great value, which is available for the benefit of his creditors. *Baxter v. Pritchard*, 1 *Ad. and Ell.* 456, 3 *Nev. and M.* 638, *S. C. Rosé v. Haycock*, *Ibid.* (*n*).

An assignment of *part* of a trader's effects to a particular creditor, (unlike, in this respect, to an assignment of the whole,) carries with it no intrinsic evidence of fraud; a trader must in the course of his business have the power to make over parts of his property, either for past debts or for future advances. Thus it has been held that an assignment of part of a trader's property, upon trust to sell and dispose of the proceeds as he shall direct, is not, in itself, an act of bankruptcy. *Robinson v. Carrington*, 1 *Mont. and Ayr*, 1. A trader, entitled to large freehold and leasehold estates, but greatly embarrassed, and having committed acts of bankruptcy, conveyed his freehold and leasehold estates to trustees, upon trust to sell or mortgage, and to apply the produce as he should direct. It appearing that the trust deed was executed under advice, for the purpose of effecting a conversion of the trader's property, with a view to an arrangement with his creditors, to which he was himself considered incompetent from the state of his health, it was held, that the trust deed was not an act of bankruptcy. *Greenwood v. Churchill*, 1 *Mylne and K.* 546, *and see Carr v. Burdiss*, 1 *Crom. M. and R.* 443. M. a trader in extensive concerns, was from January, 1831, to January, 1832, in embarrassed circumstances, and likely to become a bankrupt, although the state of his affairs was not suspected. He did become bankrupt in January, 1832. He owed his son 12,000*l.* on bond, which debt, on his son's marriage, was settled on his (the son's) wife. In May, 1831, some of M.'s property in Middlesex was released from mortgage, and on the 1st July, 1831, M., at the request of his son, conveyed it to the trustees of his son's marriage settlement, as a security for the bond debt. The transfer was not registered or otherwise made public till after M.'s bankruptcy. A special jury of London having found that it was not made voluntarily as a fraudulent preference, in contemplation of bankruptcy, the court refused a rule for a new trial. *Belcher v. Prittie*, 10 *Bingh.* 408, 4 *Moore and S.* 295, *S. C.*

But when an assignment is made, in *contemplation of bankruptcy*, and consequently with the *intent* to give the creditor *a preference* over the other creditors, it is contrary to the

ruptcy. *Eden*, 32. A transfer of goods in satisfaction of a *bonâ fide* debt made voluntarily and in contemplation of bankruptcy, is an act of bankruptcy, and is not protected by the 81st section, though made more than two months before a commission issues. *Bevan v. Nunn*, 9 *Bingh.* 107. In one case it appears to have been the opinion of the court of King's Bench, that a deed voluntarily executed by a trader, in order to give a preference to particular persons, to the prejudice of his general creditors, was fraudulent and an act of bankruptcy, although not made in contemplation of bankruptcy. *Pulling v. Tucker*, 4 *B. and A.* 382; *but see Hartshorn v. Slodden*, 2 *B. and P.* 582; *Fidgeon v. Sharp*, 1 *Marsh.* 196, *post.* But it has since been held that in order to render the conveyance, &c. of part of the bankrupt's effects fraudulent, something more is necessary, as contemplation of bankruptcy. *Gibbins v. Phillips*, 7 *B. and C.* 529. *Morgan v. Brundrett*, 5 *B. and Ad.* 289. Whether the party contemplated bankruptcy is a question for the jury, under all the circumstances of the case. *Poland v. Glyn*, 4 *Bingh.* 22 (*n*). *Flock v. Jones*, 4 *Bingh.* 20.

Proof that a trader is in embarrassed circumstances is not conclusive evidence that he contemplated bankruptcy. A., a trader, purchased goods from B. on the 8th Oct., for exportation, but finding that he must stop payment, and that he could not apply the goods to the purpose for which they were bought, he returned them on the 16th Oct. to B., and on the 17th he stopped payment, though expecting remittances from abroad more than sufficient to pay his debts, and though he had no doubt that his creditors would give him time. They, however, refusing, he was made bankrupt on the 2d Nov. Under these circumstances it was held, that the jury were warranted in finding that the delivery of the goods was not made in contemplation of bankruptcy. *Fidgeon v. Sharp*, 1 *Marsh.* 196, *and see Wheelwright v. Jackson*, 5 *Taunt.* 109, *Moore v. Barthrop*, 1 *B. and C.* 5.

In order to constitute a fraudulent preference, the transaction on the part of the trader must be voluntary; if the assignment or transfer be upon the importunity of a creditor, the transaction will be valid, and it is immaterial whether the trader had or had not an act of bankruptcy in contemplation at the time the creditor pressed for payment or security, and thereby obtained such payment or security. *Hartshorn v. Slodden*, 2 *B. and P.* 583. *Crosby v. Crouch*, 11 *East*, 261. Nor will it render such a transaction fraudulent, that it was conducted under circumstances of secrecy. If the creditor were entitled to demand, and, demanding, to receive a security

in goods for a running debt, upon what principle is he obliged to insist upon the transaction being conducted by his debtor with any particular circumstances of publicity, and which might be in other respects injurious to the general credit of such debtor? *Per Lord Ellenborough*, 11 *East*, 261. If a trader give a preference to a creditor under an apprehension, however groundless, of legal process, such preference is valid. *Thomson v. Freeman*, 1 *T. R.* 155. And where a creditor, knowing his debtor to be in distressed circumstances, and not able to pay his debts, applied to him for a security, and took part of his stock in trade for that purpose, it was held no undue preference, though the creditor did not threaten a suit in case of refusal. *Smith v. Payne*, 6 *T. R.* 152. So where A., a shopkeeper, procured B. to discount accommodation bills drawn by him, and accepted by third persons, and B. afterwards required A. to give him a collateral security for the payment of the bills, upon which A. secretly deposited with him a quantity of goods from his shop, to be sold for B.'s benefit, if the bills should not be paid, and soon after A. became a bankrupt, and the bills were dishonoured, it was held that the depositing of the goods in this manner, as a security, was not a preference in contemplation of bankruptcy. *Crosby v. Crouch*, 2 *Campb.* 166, 11 *East*, 256, *S. C.* The consideration upon which a payment, made to an importunate creditor, of a debt actually due, has been allowed to be valid, has not been that he might resort to a suit to enforce payment, but that his demand repels the presumption that the bankrupt, upon the eve of bankruptcy, made a distinction among his creditors, and spontaneously favoured one of them to the prejudice of the rest. A demand of further security for a debt not yet due has the same effect, and in neither case is there any fraud upon the bankrupt laws, on which ground alone transactions previous to the bankruptcy can be set aside. *Per Lord Ellenborough, ibid.* Again, where a trader, at the instance of his creditor, gave goods out of his shop, in part payment of a bond not then due, the transaction was held valid. *Hartshorn v. Slodden*, 2 *B. and P.* 582, 11 *East*, 260. And where a trader, without solicitation, and in contemplation of stopping payment, put three cheques into the hands of his clerk, to be delivered to a creditor at the counting-house of the latter, but before the delivery, the creditor called upon the trader, and demanded payment of his debt, it was ruled that the intention of making a voluntary preference not having been consummated, the payment stood good. *Bayley v. Ballard*, 1 *Campb.* 416, *but see Singleton v. Butler*, 2 *B. and P.* 283, *post, and see Cook v. Rogers*, 7 *Bingh.* 446, where *Bayley v. Ballard*, is doubted by Park, J. A debtor being insolvent and in prison, went, under a day rule, to receive a sum of money due to him from a fire-office; a creditor met him there and demanded and received,

out of the money, payment of his debt, having no notice of the debtor's insolvency and imprisonment. Eight days afterwards a commission issued against the debtor. It was held that this was no fraudulent preference. *Churchill v. Crease*, 5 *Bingh*. 177. A trader had property to a considerable amount standing in the Custom House in his own name, but in fact purchased on account of A. A bill deposited with A. by the trader, as a security, appearing to be a forgery, A. insisted upon having the property transferred to himself, which was done on the 14th and 15th of January. On the 17th the trader became bankrupt. Lord Ellenborough said that the question for the jury was, whether the transfer was voluntary, or made under the apprehension that a degree of force, *civil or criminal*, was about to be applied. *De Tastet v. Carroll*, 1 *Stark*. 88, *and see Atkins v. Seward, Manning's Index*, 62, 63. In these cases, the length of time elapsing between the transaction and the bankruptcy, is a material consideration, and with regard to the contemplation of bankruptcy, the question is not what was the *real* state of the trader's affairs, but what was the state of his affairs *in his own judgment*. *Belcher v. Prittie*, 10 *Bingh*. 408.

But where a trader, being pressed by a creditor for payment, or security, one or other of which he said he would have, gave a bill of sale of certain wools and cloths in a mill, apparently the whole of his stock, and immediately left his business and home, and became bankrupt, it was held that, inasmuch as the act done did not redeem the trader, even from any present difficulty, which is the ordinary motive for such an act when really done under the pressure of a threat, it was evidence that it was not done under such a pressure, but voluntarily, and with a view to prefer the particular creditor in contemplation of bankruptcy. *Thornton v. Hargreaves*, 7 *East*, 544. The acceptor of a bill of exchange, two days before the expiration of the time for which the bill was originally drawn, called upon the indorser, and informed him privately that he was insolvent: the indorser insisted on being paid the amount of the bill, offering at the same time to become security to the creditors for so much as the estate should produce, whereupon the acceptor paid it, and four days after became bankrupt. It appeared also, that the bill had been altered so as to make it fall due before this transaction, but without the indorser's knowledge. These circumstances were held to afford evidence of a fraudulent preference. *Singleton v. Butler*, 2 *B. and P.* 283, *see Bayley v. Ballard*, 1 *Campb*. 416, *supra*. Where a trader, being pressed, conveyed estates in trust to sell and pay the pressing creditor, with a further trust to pay debts to certain relatives, it was held a preference in contemplation of bankruptcy. *Morgan v. Horseman*, 3 *Taunt*. 241. If evidence of a threat is given, to show that the transaction was not a voluntary one on the part of the bankrupt, it is still mat-

ter of consideration for the jury whether that threat had any operation or not, and the motives of the trader may be properly inquired into. *Cook v. Rogers*, 7 *Bingh.* 438.

The declarations of the trader connected with the fraudulent assignment are evidence towards establishing the act of bankruptcy. *Ridley v. Gyde*, 9 *Bingh.* 349.

A sale of part of a trader's effects may be an act of bankruptcy, if the sale be in fact fraudulent, without reference to its being made in contemplation of bankruptcy. Thus if a sale take place under such circumstances that the buyer, as a man of business and understanding, ought to suspect and believe that the seller means by it to get money for himself in fraud of his creditor, it is fraudulent and an act of bankruptcy. *Cook v. Caldecott, M. and M.* 522.

Evidence of act of bankruptcy—lying in prison.] This act of bankruptcy does not relate to the first day of the imprisonment. *Higgins v. M'Adam*, 3 *Young and Jer.* 1. *Moser v. Newman*, 6 *Bingh.* 556, 4 *Moore and P.* 333, *S. C. See Tucker v. Barrow, M. and M.* 137. In order to render a lying in prison twenty-one days an act of bankruptcy, the arrest must be for a subsisting legal debt. *Eden*, 35. A penalty due to the crown has been considered a sufficient debt. *Cobb v. Symonds*, 5 *B. and A.* 516. The time of lying in prison commences from the first arrest, the day of arrest being included. *Glassington v. Rawlins*, 3 *East*, 407. 3 *Stark.* 73. Where bail is put in, and the defendant surrenders in discharge of his bail, the time is computed from the surrender; *Tribe v. Webber*, *Willes*, 464; but where the bankrupt was arrested in Kent on the 31st March, and on the 8th of May brought by *habeas corpus* to be bailed, and on the road to the judge's chambers was permitted to call at his attorney's house, which was out of the county of Kent, whence he was carried directly to a judge's chambers, to be bailed, and was bailed accordingly, and *immediately* surrendered by the bail, it was held, that the act of bankruptcy had relation to the 31st March. *Rose v. Green*, 1 *Burr.* 437. If the defendant is suffered to go at large after the arrest, and afterwards returns into custody, the time is computed from the return. *Barnard v. Palmer*, 1 *Campb.* 509. Where the defendant, at the time of the arrest, was sick, and consequently suffered to remain some time in his own house, the key of which was kept by the officer's follower not named in the warrant, the time was held to run from the arrest. *Stevens v. Jackson*, 4 *Campb.* 164, 6 *Taunt.* 106, *S. C.* And so where the party has the benefit of day rules during the period. *Soames v. Watts*, 1 *C. and P.* 400. If a commission *issues* before the time expires, it cannot be supported, though it would be no objection that the requisite time had not expired when the *docket* was struck. *Gordon v. Wil-*

kinson, 8 *T. R.* 507. *Wydown's case*, 14 *Ves.* 80. *Ex parte Dufresn*, 1 *V. and B.* 51. The arrest may be proved by an examined copy of the writ, and return of *cepi corpus*, or by proof of the writ, the warrant, and the arrest, *vide, ante, p.* 387: The fact of lying for the twenty-one days in prison may be proved by the production of the prison books. *Salte v. Thomas*, 3 *B. and P.* 188, *ante, p.* 138. The cause of the commitment may be proved by production of the *committitur*. *Ibid.*

Evidence of act of bankruptcy—filing petition to take the benefit of the insolvent act.] This act of bankruptcy is introduced in the insolvent act, 7 Geo. 4, c. 57, and is not contained in the new bankrupt act. The office copy of the petition is made evidence of the act of bankruptcy, but it is not to be an act of bankruptcy, unless the party be declared bankrupt before the time advertised in the Gazette for hearing the petition, or within two calendar months from the filing of it, within which time it will have the effect of avoiding the assignment under the insolvent act. The filing of the petition is not complete till it reaches its final destination in the proper office. *Garlick v. Sangster*, 9 *Bingh.* 46.

Evidence of the commission, assignment, &c.] Before the 2 and 3 W. 4, c. 114, the proof of commissions and other proceedings in bankruptcy was regulated by 6 Geo. 4, c. 16, ss. 96 and 97 ; but by the 2 and 3 W. 4, c. 114, reciting that those enactments had been found defective, and that no provision had been made in the 1 and 2 W. 4, c. 56, for entering of record fiats and other proceedings not prosecuted in the court of bankruptcy, it is enacted (section 1) that the records of all commissions of bankrupt and of all proceedings under the same, which may have been theretofore entered of record, pursuant to 6 Geo. 4, c. 16, or any other act, shall be removed into the court of bankruptcy, and shall be kept as records of that court, &c.; provided always (section 2) that all commissions issued before 1st of September, 1825, and all depositions and other proceedings relating to such commissions directed to be enrolled and actually entered of record upon or since that day, shall be deemed and taken to have been well and effectually entered of record. And by section 3, the certificate of such entry, purporting to be signed by the person appointed to enter such proceedings, or by his deputy, shall have the same effect as if such commission had been issued after the 1st September, 1825, and shall be received in evidence without proof of the appointment or handwriting of such person.

By section 4, any of the judges of the court of bankruptcy may direct any commission theretofore issued, and the depositions and proceedings under the same, to be entered upon the records of the court.

By section 5, all fiats already issued or thereafter to be issued, in lieu of commissions, to be prosecuted elsewhere than in the court of bankruptcy, and all adjudications and all appointments of assignees and certificates of conformity made and allowed under such fiats, may and shall be entered of record in the said court of bankruptcy, upon the application of or on behalf of any person interested therein.

By section 8, no fiat issued or to be issued in lieu of a commission, whether prosecuted in the court of bankruptcy or elsewhere, nor any adjudication of bankruptcy or appointment of assignees, or certificate of conformity under such fiat, shall be received in evidence in any court of law or equity, unless the same shall have been first entered of record in the court of bankruptcy as aforesaid.

And by section 9, upon the production in evidence of any commission, fiat, adjudication, assignment, appointment of assignees, certificate, deposition, or other proceeding in bankruptcy, purporting to be sealed with the seal of the said court of bankruptcy, or of any writing purporting to be a copy of any such document, and purporting to be sealed as aforesaid, the same shall be received as evidence of such documents respectively, and of the same having been so entered of record as aforesaid, without any further proof thereof, provided, neverless, that all fiats and proceedings under the same which may have been entered of record before the passing of this act, shall and may upon production with the certificate thereon, purporting to be signed by the person so appointed to enter proceedings in bankruptcy, or by his deputy, be received as evidence of the same having been duly entered of record, any thing herein contained notwithstanding.

In cases before the 1 and 2 Wm. 4, c. 56, the assignment was proved by production of the deed, with the certificate of enrolment, and evidence of the execution by the commissioners, but by the general practice of the courts it was admitted, unless notice to dispute it had been given. *Tucker v. Burrow, M. and M.* 137. This practice, however, was mere matter of courtesy, and if the objection was taken, the execution of the instrument must have been proved. *Gomersall v. Serle, 2 Y. and J.* 5. *Hunt v. Connor,* 1 *Chitty's Stat.* 110 *(n), and see Read v. Cooper,* 5 *Taunt.* 89.

By 6 Geo. 4, c. 16, s. 98, all commissions, conveyances, and instruments relating to the estates of bankrupts, are, from 1st Sept. 1825, exempted from stamp duty.

The law with regard to the proof of the assignment, and of the deed of bargain and sale to the commissioners, is entirely altered by 1 and 2 W. 4, c. 56, by which the necessity for those instruments is done away and the property is made to vest directly in the assignees.

By section 25, it is enacted, that when any person has been

adjudged a bankrupt, all his personal estate and effects, present and future, which by the laws now in force may be assigned by commissioners acting in the execution of a commission against such bankrupt, shall become absolutely vested in and transferred to the assignees or assignee for the time being, by virtue of their appointment, without any deed of assignment for that purpose, as fully to all intents as if such estate and effects were assigned by deed to such assignees and the survivor of them; and as often as any such assignee shall die, or be lawfully removed, and a new assignee duly appointed, all such personal estate as was then vested in such deceased or removed assignee, shall, by virtue of such appointment, vest in the new assignee, either alone or jointly with the existing assignees, as the case may require, without any deed of assignment for that purpose.

By section 26, it is enacted, that when any person shall have been adjudged a bankrupt, all such present and future real estate of such bankrupt, whether in the United Kingdom of Great Britain and Ireland, or in any of the dominions, plantations, or colonies belonging to His Majesty, as by the recited act is directed to be conveyed by the commissioners to the assignees, shall vest in such bankrupt's assignee or assignees for the time being, by virtue of his or their appointment, without any deed of conveyance for that purpose, and as often as any such assignee or assignees shall die, or be lawfully removed or displaced, and a new assignee or assignees shall be duly appointed, such of the aforesaid real estate as shall remain unsold or unconveyed shall, by virtue of such appointment, vest in the new assignee or assignees either alone or jointly with the existing assignees, as the case may require, without any conveyance for that purpose.

Section 27 provides that in cases where a conveyance of the property of a bankrupt would require to be registered, the certificate of the appointment of the assignee or assignees shall be registered.

And by section 29, a certificate of the appointment of such assignees, purporting to be under the seal of the Court of Bankruptcy shall be received as evidence of such appointment in all courts and places whatsoever, without further proof. *See 2 and 3 Wm. 4, c. 114, s. 9, ante, p. 556.*

Evidence with regard to the title of assignees under joint and separate commissions, &c.] Where separate fiats have been issued against several persons, and the *same persons* are appointed assignees under each, they may describe themselves as assignees of those bankrupts generally, and may give evidence of a joint demand due to all the bankrupts; *Scott v. Franklin*, 15 *East*, 428; *Streatfield v. Halliday*, 3 *T. R.* 779; 2 *Saund.* 47, *o* (*n*); but in such action they cannot recover

also for separate demands due to each of the bankrupts. *Hancock v. Haywood*, 3 *T. R.* 433. And where there are separate fiats against several partners, and *different* assignees under each fiat, in declaring for a joint debt the assignees must not describe themselves as joint assignees, but as assignees of each bankrupt respectively. *Ray v. Davies*, 8 *Taunt.* 134, 2 *B. Moore*, 3, *S. C.* The assignees under a joint fiat against A. and B., in suing on a separate contract made with A., may describe themselves generally as the assignees of A., without noticing B. *Stonehouse v. Da Silva*, 3 *Campb.* 399. *Harvey v. Morgan*, 2 *Stark.* 17. And the assignees under a joint fiat against two partners may recover in the same action debts due to the partners jointly, and debts due to them separately. *Graham v. Mulcaster*, 4 *Bingh.* 115. But assignees under a joint fiat against A. and B., who have committed acts of bankruptcy at different times, cannot recover money received by the defendant between the acts of bankruptcy, either as money had and received to the use of the bankrupts, or to the use of the assignees. *Hogg v. Bridges*, 8 *Taunt.* 200. Where the assignees of two partners declared in trover upon the possession of the bankrupts only, and it appeared in evidence that the greater part of the goods in question belonged to one of the partners only, before the commencement of the partnership, and had never been brought into the partnership fund, and that the residue formed part of the joint estate, Lord Kenyon held that the plaintiffs could recover the residue only, whereas, if there had been a count on the possession of the assignees, as it was a joint commission, and the assignment under such commission passes both joint and separate effects, the whole might have been recovered. *Cock v. Tunno*, *Selw. N. P.* 1316, *and see* 2 *Saund.* 47, *o* (*n*).

Where the appointment of an assignee is vacated by the chancellor, and a new assignee is appointed, the latter is assignee by relation, and may sue in his own name as assignee on a contract made by the former assignee. *Aldritt v. Kettridge*, 1 *Bingh.* 355.

Evidence in particular actions by assignees of bankrupts.] In many cases of transactions between the bankrupt and others, after an act of bankruptcy committed, the assignees have the option, either of adopting the contract made by the bankrupt, and suing the party in an action of assumpsit, or of disaffirming the contract, and suing him for damages in an action of trover. They cannot, however, disaffirm the transaction, if it appears that they have once affirmed it. *Brewer v. Sparrow*, 7 *B. and C.* 310. Therefore, where assignees had recovered a sum of money from the bankrupt's banker, which had been received by him, and the amount of which had been paid over to a creditor of the bankrupt, with a knowledge of the bank-

ruptcy, it was held that they could not sue the creditor who had received it; for, having disaffirmed the banker's acts in the former action, they could not in the present suit affirm them as payments of the bankrupt's money. *Vernon v. Hanson*, 2 *T. R.* 287. So where the bankrupt, before his bankruptcy, had purchased goods on credit, and re-sold them fraudulently, at under prices, it was ruled that assumpsit for goods sold and delivered could not be maintained by the assignees against the purchaser to recover the difference in value, which would be both to affirm and disaffirm the contract. *Burra v. Clarke*, 4 *Campb.* 355. Money had and received has been held to be maintainable against a person, who, after taking the goods of the bankrupt in execution after an act of bankruptcy, has taken them under a bill of sale from the sheriff. *Reed v. James*, 1 *Stark.* 134. And where a bankrupt, after an act of bankruptcy, contracted with a factor, to whom he had delivered goods for sale, and who had accepted a bill upon the strength of the goods, to return the goods, if he would return the bill, and did return the bill, it was ruled that the assignees might adopt this contract and recover against the factor for the non-delivery of the goods. *Butler v. Carver*, 2 *Stark.* 433.

Where the goods of the bankrupt have been converted by the defendant, either before or after the bankruptcy, the assignees may recover their value in an action of trover. Where there has been a tortious taking since the bankruptcy, such taking is a sufficient conversion; but where there has been a collusive sale of the goods by the trader in contemplation of bankruptcy, there will be no conversion without evidence of a demand and refusal. *Nixon v. Jenkins*, 2 *H. Bl.* 135. *ante, p.* 511. In some cases although trover will lie, yet it is necessary to bring assumpsit, in order to recover substantial damages. Thus, where after his bankruptcy the bankrupt drew a check in favour of one of his creditors, upon his bankers, who paid the check, it was held that the assignees could not recover the amount of the money in trover against the creditor, but only the value of the paper. *Matthew v. Sherwell*, 2 *Taunt.* 439, *and see Walker v. Laing*, 7 *Taunt.* 568. A sheriff who seizes and sells the goods of the bankrupt after an act of bankruptcy committed, is liable in trover, although he had no notice of the act of bankruptcy. *Potter v. Starkie, cited* 4 *M. and S.* 260. *Garland v. Carlisle*, 10 *Bingh.* 452, 4 *Moore and P.* 24, *S. C.* *Vide infra, p.* 612.

Evidence in particular actions—as to reputed ownership.] By 6 Geo. 4, c. 16, s. 72, if any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels, whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or dispo-

sition, as owner, the commissioners shall have power to sell the same for the benefit of the creditors.

All personal goods and chattels are within the statute, as ships; *Stephens v. Sole, cited* 1 *Ves.* 352, *ex parte Burn*, 1 *Jac. and W.* 378; utensils of trade; *Lingard v. Messiter*, 1 *B. and C.* 308, *Sinclair v. Stevenson*, 2 *Bingh.* 514; unless such utensils are let, and there is a usage of trade for the utensils to be so let; *Horn v. Baker*, 9 *East*, 215, 239; so stock; *ex parte Richardson*, *Buck*, 480; bills of exchange; *Hornblower v. Proud*, 2 *B. and A.* 327; policies of insurance; *Falkener v. Case*, 1 *Br. C. C.* 125; shares in a public company, *Nelson v. London Ass. Co.*, 2 *S. and S.* 292; and in a newspaper; *Longman v. Tripp*, 2 *Bos. and Pul. N. R.* 67; have been held to be within the statute.

In order to bring the case within the statute, the assignees should, in general, give some evidence beyond that of mere possession. Where the bankrupt has once been the owner of the property in question, the mere fact of possession may, it is said, raise a presumption that he continues in possession as reputed owner; but where the bankrupt has never been the real owner, possession may not, of itself, be sufficient to show him to be reputed owner, and it would then be necessary for the assignees to establish that fact by other evidence. *Lingard v. Messiter*, 1 *B. and C.* 308. Where it appears in evidence that, in some instances, articles used in collieries belong to the tenants, and that in others they do not; that, though in some cases the landlord, in demising collieries, permits the lessee, on certain conditions, to have the use of the fixtures and other things during the demise, yet that, in other instances, they belong absolutely to the lessee; then, if the possession of such things is consistent with the fact of a person being absolute owner, and also of his not being absolute owner, the mere possession of such things ought not to raise an inference in the mind of any cautious persons, acquainted with the usage, that the person in possession is the owner. *Per Abbott, C. J.*, *Storer v. Hunter*, 3 *B. and C.* 376, *see Thackthwaite v. Cock*, 3 *Taunt.* 487, *post*. In order to prove the bankrupt *reputed owner*, evidence of reputation is admissible; *Oliver v. Bartlett*, 1 *B. and B.* 269; and, on the other hand, evidence of a contrary reputation is admissible for the defendant. *Gurr v. Rutton*, *Holt*, 327. Thus, evidence of the bankrupt being in possession of furniture, &c., under an agreement which was notorious in the neighbourhood, was held to take the case out of the statute. *Muller v. Moss*, 1 *M. and S.* 335.

Evidence of reputed ownership "at the time he becomes bankrupt."] Goods which have come to the possession of the bankrupt, *after* the act of bankruptcy, are not within the statute. *Lyon v. Weldon*, 2 *Bingh.* 334. So, if the goods are taken

out of the possession of the bankrupt, before the act of bankruptcy, they will not pass to the assignees. Thus, where the purchaser of goods, lying at a wharf, received a delivery order from the seller, but suffered them to remain in the name of the seller for several months, during which time the seller disposed of a part, till, upon notice of the seller's insolvency, the purchaser had the goods transferred into his own name nine days before the seller's bankruptcy, it was held that the goods did not pass under the statute. *Jones v. Dwyer*, 15 *East*, 21. So where the purchaser took possession the *day before* the bankruptcy. *Arbouin v. Williams, R. and M.* 72 ; *but see Darby v. Smith*, 8 *T. R.* 82, 15 *East*, 26. But a removal on the *same day*, but before the act of bankruptcy, will not take the case out of the statute. *Arbouin v. Williams, R. and M.* 72. A *demand* by the owner of the goods, before the act of bankruptcy, is sufficient to take them out of the order and disposition of the bankrupt. *Smith v. Topping*, 5 *B. and Ad.* 674, 2 *Nev. and M.* 421, *S. C.*

Evidence of reputed ownership—" by consent and permission of the true owner."] The property of infants, who cannot consent, is not within the statute. *Viner v. Cadell*, 3 *Esp.* 88. So stock, transferred by the accountant general into the name of the mortgagor, without the privity of the mortgagee, will not pass. *Ex parte Richardson, Buck*, 480. But where a trustee sold and let the purchaser into possession before payment, the case was held to be within the statute, for by the " true owner," the legal owner is intended. *Ex parte Dale, Buck*, 365.

It is not sufficient to show that the goods were in the order and disposition of the bankrupt, with the consent of a person *who was permitted by the true owner to deal with them as his own*, but the consent must move directly from the true owner to the bankrupt. *Fraser v. Swansea Canal Company*, 1 *Ad. and Ell.* 355, 3 *Nev. and M.* 391, *S. C.*

Evidence of reputed ownership—" have in his possession, order, or disposition."] Where a warrant was directed to a trader's servant and another person, as special bailiffs, who took possession of the goods in the shop, but the business, without the trader's interference, was carried on apparently as usual, it was held that the possession of the servant was the possession of the master, and that the case was within the statute. *Jackson v. Irvin*, 2 *Campb.* 48. *Toussaint v. Hartop, Holt*, 335 ; *and see Doker v. Hasler*, 2 *Bingh.* 479. Where a trader gave a creditor an order to receive a certain sum of money in the hands of A., whom he directed to transmit it to the creditor, and whilst the money was in the hands of the carrier the trader became bankrupt, Lord Ellenborough was of opinion,

that while the money was in the hands of the carrier the property remained unaltered, and that the case was within the statute. *Hervey v. Liddiard*, 1 *Stark*. 123. But the possession of a pawnee is not the possession of the bankrupt pawnor, so as to bring the goods pawned within the statute. *Greening v. Clark*, 4 *B. and C.* 316. Where the goods were by agreement left in the vendor's possession, but the purchaser marked them with his initials, they were held to be within the statute; *Knowles v. Horsfall*, 5 *B. and A.* 134, *Lingard v. Messiter*, 1 *B. and C.* 308; but, where wine sold by the bankrupt was, for the purchaser's convenience, bottled and deposited in the bankrupt's cellar, set apart in a particular bin, marked with the purchaser's seal, and entered in the bankrupt's books as belonging to the purchaser, it was held not to be within the statute. *Ex parte Marrable*, 1 *G. and J.* 402. *Carruthers v. Payne*, 5 *Bingh*. 270. So where A. deposited with B. as a security certain warrants of the West India Dock Company for sugars deposited in their warehouses, and entered in his name in their books, and the company assented to the transfer, and A. afterwards became bankrupt, it was held that the sugars did not pass to A.'s assignees, as the transfer of the warrants was a complete transfer of the possession before the bankruptcy. *Lucas v. Dorrien*, 1 *B. Moore*, 29. So wines in the London docks, which pass by the indorsement of the warrants, are not in the order and disposition of the bankrupt, unless he has the warrants in his possession. *Ex parte Davenport*, *Mont. and Bligh*, 165. If a symbolical delivery only can be made, it is sufficient to take the case out of the statute. *Manton v. Moore*, 7 *T. R.* 67. *Mair v. Glennie*, 4 *M. and S.* 240. *Brown v. Heathcote*, 1 *Atk*. 160. Where a person entitled to take out letters of administration neglected to do so, but remained in possession of the goods of the intestate, and became bankrupt, the case was held within the statute. *Fox v. Fisher*, 3 *B. and A.* 135. Where A., a dyer, having purchased a plant of B., resold it to him, and B. never took actual possession, but demised it to A. for three years, during which time A. became bankrupt, the plant was held to pass to his assignees. *Bryson v. Wylie*, 1 *B. and P.* 83 (*a*). So where a creditor purchased under a bill of sale from the sheriff, certain machinery of his debtor, taken in execution at his suit, and having marked them with his initials, demised them to his debtor, it was held, that as the change of ownership was not notorious, the machinery passed to the assignees of the debtor. *Lingard v. Messiter*, 1 *B. and C.* 308. *See Storer v. Hunter*, 3 *B. and C.* 368, *Horn v. Baker*, 9 *East*, 215. *Lingham v. Biggs*, 1 *B. and P.* 82. *Clark v. Crownshaw*, 3 *B. and Ad.* 804. Where a testator directed, in case his son should carry on his trade, that his lease and furniture should not be sold, but that his trustees should permit his widow and chil-

dren to reside in his dwelling-house, and have the use of the furniture, it was held that the furniture did not pass to the assignees of the mother and son, who had carried on the trade. *Ex parte Martin*, 2 *Rose*, 331. So furniture left to trustees to be enjoyed with a mansion-house, and not to be removed without the leave of the trustees. *Earl of Shafts. v. Russel*, 1 *B. and C.* 666.

So where household furniture and stock, in pursuance of an agreement for sale of a dwelling-house and the household furniture and stock therein, were left in the dwelling-house, in the possession of the seller, for three months after the sale, they were held not to be in his order and disposition on his becoming bankrupt within the three months, the sale being *notorious* in the neighbourhood. *Muller v. Moss*, 1 *Maule and S.* 335.

But where a house was let with a covenant to determine the lease on the lessee committing an act of bankruptcy, and by another deed the furniture of the house was demised subject to a similar covenant, it was held that the furniture passed to the assignees of the lessee, who became bankrupt, the jury having found that he was the reputed owner of the furniture. *Hickenbotham v. Groves*, 2 *C. and P.* 492.

Where a trader authorised a broker, employed by him to distrain, to pay a debt due by him to a third person, and the broker promised such third person to pay him the same, it was held that the assignees could not recover the amount of such debt, although he did not pay it until after commission issued. *Bedford v. Perkins*, 3 *C. and P.* 90.

Evidence of reputed ownership—goods sent on sale or return.] Goods sent upon sale or return to a trader are within his possession, order, and disposition, and pass to his assignees. *Livesay v. Hood*, 2 *Campb.* 83. And where there was a custom that the purchasers of hops should leave them in the vendor's warehouse for the purposes of sale, undistinguished from his other stock, they were held to pass to his assignees. *Thackthwaite v. Cock*, 3 *Taunt.* 487; *see* 5 *B. and A.* 144, 3 *B. and C.* 376. But where goods sent on sale or return, the trader to return such as he should not approve of, arrived only the day before the trader's bankruptcy, they were held not to pass to his assignees, for he should have been allowed a reasonable time to have selected such goods as he was disposed to retain. *Gibson v. Bray*, 8 *Taunt.* 76.

Evidence of reputed ownership—goods belonging to feme covert.] Goods belonging to a woman living with the trader as his wife, and asserting herself to be his wife, will pass to his assignees; *Mace v. Cadell*, *Cowp.* 232; but where, on marriage, goods are vested in trustees for the separate use of the wife,

in order to enable her to carry on a separate trade, and the husband live with her, if he do not intermeddle with them, and there be no fraud, such effects will not pass to the assignees of the husband; but whether the trade be carried on solely by the wife, or jointly with the husband, is a question of fact for the jury; and if they determine the latter, the effects will pass to the assignees. *Jarman v. Woolloton*, 3 *T.R.* 618. *See also Dean v. Brown*, 5 *B. and C.* 336.

Evidence of reputed ownership—in case of partners.] It was held in one case that the share of a dormant partner is not within the statute, the ostensible partner having become bankrupt; *Coldwell v. Gregory*, 1 *Price*, 119; but this case has been much doubted, *ex parte Dyster*, 2 *Rose*, 256, and may be considered as overruled by the following decision. A. and B. were partners, but the whole business was carried on by, and in the name of A., B. not appearing to the world as a partner. At the dissolution of the partnership all the joint stock and effects, by agreement, were left in the hands of A., who was to receive and pay all the debts due to and from the concern. After carrying on the business for a year and a half, A. became bankrupt. It was held that the partnership property passed to his assignees. *Ex parte Enderby*, 2 *B. and C.* 389, 406; *and see ex parte Barrow*, 2 *Rose*, 252.

Evidence of reputed ownership—ships.] A ship, registered in the name of one partner, but suffered to be in the possession, order, and disposition of the partnership, will pass under the assignment of the joint estate. *Ex parte Burn*, 1 *J. and W.* 378. Upon the sale or mortgage of a ship at sea, the transfer being symbolical by delivery of the grand bill of sale, upon the return of the ship, the transfer will be invalid, if the purchaser, after notice, neglect to take possession, or notify the transfer to the captain. *Mair v. Glennie*, 4 *Maule and S.* 240. *Richardson v. Campbell*, 5 *B. and A.* 196.

And by 4 Geo. 4, c. 41, s. 44, where any transfer of any ship or vessel, or any share thereof, shall have been made as a security for the payment of any debt, either by way of mortgage, or of any assignment to a trustee, for the purpose of selling for the payment of any debt, if such transfer shall have been duly registered according to the provisions of the act, the interest of the mortgagee shall not be affected by the bankruptcy of the mortgagor, notwithstanding that the ship was at the time in the possession, order, and disposition of the bankrupt, and that he was reputed owner. *See Robinson v. Macdonnell*, 5 *Maule and S.* 228. *Kirkby v. Hodgson*, 1 *B. and C.* 588.

Evidence of reputed ownership—debts, &c.] Where a simple

contract debt is assigned, the assignor is considered as having the order and disposition of the debt with the consent of the true owner, until the debtor has notice of the assignment. *Buck v. Lee*, 3 *Nev. and M.* 580. Where the freight to be earned by a ship is assigned, and notice given to the party who is to pay it, the freight is no longer in the order and disposition of the assignor. *Douglas v. Russell*, 4 *Sim.* 524. 1 *Mylne and K.* 488.

Evidence of reputed ownership—fixtures.] Whether fixtures will pass to the assignees of a bankrupt, as being in his order and disposition, has been the subject of many decisions. In the following cases they were held not to pass. The lessee of land having erected a distillery thereon, demised the same to persons who became bankrupt, but the court held that the stills, &c., being fixed to the freehold, did not pass to the assignees. *Horn v. Baker*, 9 *East*, 215. L. took a lease of a mill and iron-forge, and purchased the fixtures and moveable utensils from the landlord. He afterwards mortgaged them, and became bankrupt. The case was held to be governed by the preceding decision. *Clark v. Crownshaw*, 3 *B. and Ad.* 804. A steam-engine was erected at the joint expense of landlord and tenant for the purpose of working a colliery, to be used by the tenant during the term, but to be held as the property of the landlord, subject to such use. The court held this case not to be within the statute. *Coombs v. Beaumont*, 5 *B. and Ad.* 72; 2 *Nev. and M.* 235, *S. C.* In the above case, Parke, J., observed, that there was no distinction between fixtures removable, as between landlord and tenant, and fixtures not so removable. *Sed vide dictum of Sir G. Rose, ib., cited arguendo.* The tenant in fee of a cotton mill, which contained a steam-engine, boilers, &c., mortgaged those articles, but remained in possession till his bankruptcy. The plate of the engine (which formed no part of the working apparatus) was fixed to the freehold of the mill. Every other part of the machine was secured by bolts and screws, and might be removed without injury to the Building. It was held that the steam-engine, &c., were not in the order and disposition of the mortgagor at the time of his bankruptcy. *Hubbard v. Bagshaw*, 4 *Simons*, 326. A trader mortgaged premises, on which were a steam-engine and other fixtures, erected for the purposes of trade; having become bankrupt while continuing in possession, the Court of Review held this not to be a case of reputed ownership. *Ex parte Lloyd*, 1 *Mont. and Ayr.* 494. *Ex parte Wilson*, 2 *Mont. and Ayr.* 61. *Ex parte Belcher*, 2 *Mont. and Ayr.* 160. In the above cases the courts appear to have proceeded on the ground that *fixtures* cannot be considered as "goods and chattels" within the meaning of the statute.

In one case the Court of Exchequer seem to have thought that fixtures would pass to assignees, on the ground of their being personal property. *Trappes v. Harter*, 2 *Crom. and M.* 153; 3 *Tyr.* 603, *S. C.*. But this decision must be regarded as overruled (so far as the above principle is concerned) by the later case of *Boydell v. M'Michael*, 1 *Crom. M. and R.* 177.

Evidence of reputed ownership—in the bankrupt's possession as executor.] Goods of a testator or intestate, in the possession of the bankrupt, as executor or administrator, are not within the statute. *Ex parte Ellis*, 1 *Atk.* 101, 4 *T. R.* 629. So where the wife of the bankrupt is executrix. *Viner v. Cadell*, 3 *Esp.* 88. And even money, if it can be specifically distinguished, will not pass to the assignees. *Per Lord Mansfield*, 3 *Burr.* 1369, 3 *M. and S.* 578. *See Fox v. Fisher*, 3 *B. and A.* 135.

Evidence of reputed ownership—in the bankrupt's possession as factor.] Goods in the bankrupt's possession as factor will not pass to his assignees. *B. N. P.* 42. *Per Lord Mansfield, Mace v. Cadell, Cowp.* 232. If the factor has sold the goods and received the proceeds before the bankruptcy, the principal must come in with the rest of the creditors and prove; *Scott v. Surman, Willes*, 400; but if the factor takes notes in payment, *ibid.*, or exchanges the original goods for other goods, *Whitecomb v. Jacob*, 1 *Salk.* 160, the notes or goods are the property of the principal, and do not pass to the assignees; *see Taylor v. Plumer*, 3 *Maule and S.* 562; and if the goods have been sold, and the price has not been paid before the bankruptcy of the factor, and the assignees receive the money, the principal may sue them. *Scott v. Surman, Willes*, 400.

Evidence of reputed ownership—in the bankrupt's possession for a particular purpose.] Where goods are in the bankrupt's possession for a particular purpose, they do not pass, under the statute, to his assignees. Thus bills deposited by a customer with his banker, and entered as cash (whether indorsed by the customer or not,) for the purpose of obtaining payment, which, by the London bankers, are usually entered short (that is, not carried to the customer's credit as cash till paid), do not pass to the assignees of the banker on his becoming bankrupt. *Giles v. Perkins*, 9 *East*, 12. *Ex parte Serjeant*, 1 *Rose*, 153. But even where the bills are entered short, yet if it appears from the habits of dealing between the parties that they were considered as cash, they will pass to the assignees. *Ex parte Thompson, Mo. and Mac.* 102. And where the bills are not entered short, but are treated as cash, they do not pass to the assignees. A customer was in the habit of indorsing, and

paying into his banker's hands, bills not due, which, if approved, were immediately entered (as bills) to his credit, to the full amount, and he was then at liberty to draw for that amount by checks on the bank. The customer was charged interest upon all cash payments to him from the time when made, and upon all payments by bills, from the time when they were due and paid, and had credit for interest upon cash paid into the bank from the time of the payment, and upon bills paid in from the time when the amount of them was received. The bankers paid away such bills to their customers as they thought fit. The bankers having become bankrupt, it was held that the bills paid in by the customer, and remaining in specie in the banker's hands, did not pass to the assignees, the cash balance, independently of the bills, being in favour of the customer at the time of the bankruptcy. *Thompson v. Giles*, 2 *B. and C.* 422. *Ex parte Armitstead*, 2 *G. and J.* 371, *see M. and M.* 108 (*n*). Bills of exchange were paid by a customer to his account with a banker, and entered as cash, with a distinct interest account. The customer had credit to the amount of the bills so entered, but in fact never overdrew the account. There was evidence of a custom in the country to circulate short bills, but no express authority was given by the customer to the banker to circulate the bills in question. It was held by the lord chancellor, reversing an order of the vice chancellor, that on the bankruptcy of the banker these bills did not pass to his assignees. *Ex parte Benson, Mont. and Bligh*, 120. But where bills are not remitted for a particular purpose, but to be discounted, and they are discounted accordingly, they pass to the assignees. *Carstairs v. Bates*, 3 *Campb.* 301, 2 *B. and C.* 432. So where bills are sent by one trader to another trader, on a general running account; *Bent v. Puller*, 5 *T. R.* 494 ; or where there is an exchange of bills for bills. *Hornblower v. Proud*, 2 *B. and A.* 327 ; *see Parke v. Eliason*, 1 *East*, 554.

A. and B. agreed that B. should purchase of A. the light gold coin which he should send, at a stated price, and that A. should from time to time draw upon B. for the money due upon such sale, and that B. should also from time to time accept other bills drawn by A. for his own convenience, for which A. was to remit value: after they had acted under this contract for some time, B. became a bankrupt, being under acceptances to a large amount; and A., not knowing of the bankruptcy, sent a quantity of light gold and bills, to enable B. to discharge the acceptances, which parcel was taken to B.'s assignees. It was held that A., who had since paid B.'s acceptances, might recover back the gold and bills sent after B.'s bankruptcy, on the ground that they were sent for the particular purpose of paying those acceptances, and that, as the purpose was not answered, the property in the

gold, &c. remained in A., for whom B. should be considered as the factor or banker. *Tooke v. Hollingworth*, 5 *T. R.* 215, 2 *H. Bl.* 501, *S. C.*.

Where A. having agreed to lend B. 200*l.* to be applied to a specific purpose, drew a check on his banker for that sum, and delivered it to B., who afterwards became bankrupt, and B. not having used the check returned it to A. after having committed an act of bankruptcy, it was held that B.'s assignees could not maintain trover for the check. *Moore v. Barthrop*, 1 *B. and C.* 5. And where A. advanced money to B. then lying in prison, for the purpose of settling with his creditors, and the purpose failing, part of such money was repaid to A. by B., who became bankrupt by lying two months in prison, it was held that the assignees could not recover the money so repaid. *Toovey v. Milne*, 2 *B. and A.* 683. If money received by an overseer of the poor be kept apart from his general property, it will not pass to his assignees. *R. v. Eggington*, 1 *T. R.* 370.

Evidence of reputed ownership—in the bankrupt's possession as trustee.] Property which is in the bankrupt's hands as trustee only, will not pass under the assignment to his assignees. *Winch v. Keeley*, 1 *T. R.* 619. *Smith v. Pickering*, *Peake*, 50. *Taylor v. Plumer*, 3 *Maule and S.* 576. Thus it has been held, that where shares in an insurance company are in the name of the bankrupt, as trustee, they are not in his reputed ownership. *Ex parte, Watkins*, 1 *Mont. and Ayr.* 689.

Defence.

The defendant may either controvert the title of the plaintiffs as assignees, or the cause of action. He cannot, however, dispute the bankruptcy, *i. e.* the petitioning creditor's debt, the trading, and the act of bankruptcy, where the bankrupt, being within the realm, has not, within two months after the adjudication, given notice of his intention to dispute the commission, provided the action be for a debt or demand, for which the bankrupt might have sustained an action, *ante, p.* 529. And in all cases in which the defendant intends to dispute the bankruptcy, he must give notice of the matters which he intends to dispute, *ante, p.* 531. Where it is competent to the defendant to dispute the bankruptcy, and such notice has been given, but the bankrupt himself has given no notice, the defendant cannot take advantage of the want of a proper petitioning creditor's debt, &c., *ante, p.* 529. Where the adjudication has been disputed and established, such adjudication is in certain cases made sufficient evidence of the assignee's title, by the 1 & 2 W. 4, c. 56, s. 17, *ante, p.* 530 The defendant may show that the act of bankruptcy was a concerted one; but it has been held to be no defence to show that the com-

mission issued by the desire and at the request of the bankrupt. *Shaw v. Williams, R. and M.* 19. Formerly a different rule prevailed in bankruptcy. *Ex parte Grant*, 1 *G. and J.* 17, *Eden*, 14. But now by 1 & 2 W. 4, c. 56, s. 42, after the passing of that act no commission of bankrupt shall be superseded, nor fiat annulled, nor any adjudication reversed, by reason only that the *commission, fiat*, or *adjudication* has been concerted by and between the petitioning creditor, his solicitor, or agent, or any of them, and the bankrupt, his solicitor, or agent, or any of them. It will be observed that this section does not mention a concerted *act of bankruptcy*, and accordingly it has been held that a concerted act of bankruptcy is not protected by the statute. *Marshall v. Barkworth*, 4 *B. and Ad.* 508; 1 *Nev. and M.* 279. *S. C.*

The declarations of the petitioning creditor (since dead) made after the issuing of the commission, have been ruled to be inadmissible against the assignees, in an issue directed to try whether the commission was concerted between the petitioning creditor, the bankrupt, and the attorney. *Harwood v. Keys*, 1 *Moo. and Rob.* 204.

In proof that the act of bankruptcy was fraudulent, the defendant may give in evidence declarations of the bankrupt before his bankruptcy, "that he did not owe 10*l.* to any one," and an inquiry "whether a friendly commission could not be issued?" *Thompson v. Bridgee*, 2 *B. Moore*, 376.

Admitting the bankruptcy, the defendant may show that the property claimed did not in fact pass to the assignees under the assignment; as for instance, that though claimed as property in the possession of the bankrupt as reputed owner, it was in fact in his possession as trustee or factor. *Vide supra.*

What payments to and by, and transactions with the bankrupt, are good.] The defendant may protect himself by insisting that he comes within the clauses of the bankrupt act, by which, in various cases, transactions with the bankrupt, without notice of his bankruptcy, are declared good.

By 6 Geo. 4, c. 16, s. 81, all conveyances by, and all contracts and other dealings and transactions, by and with any bankrupt, *bonâ fide* made and entered into *more than two calendar months* before the date and issuing of the commission against him, and all executions and attachments against the lands and tenements, or goods and chattels of such bankrupt, *bonâ fide* executed, or levied, more than two calendar months before the issuing of such commission, shall be valid, notwithstanding any prior act of bankruptcy by him committed, provided the person or persons so dealing with such bankrupt, or at whose suit, or on whose account such execution or attachment shall have issued, had not, at the time of such conveyance, contract, dealing, or transaction, or at the time of

executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed; provided also that where a commission has been superseded, if any other commission shall issue against any person or persons comprised in such first commission, within two calendar months next after it shall have been superseded, no such conveyance, &c. shall be valid, unless made, &c., more than two calendar months before the issuing of the first commission. *See Tucker v. Barrow, M. and M.* 137.

On a commission issuing on May 14th, a dealing on March 14th is valid, as "more than two calendar months before the issuing of the commission." *Cowie v. Harris, M. and M.* 141. A seizing of goods under a *fi. fa.* at eleven o'clock on the 13th of August, is a *levying* more than two months before the issuing of a commission issued at twelve o'clock on the 13th of October. *Godson v. Sanctuary*, 4 *B. and Ad.* 255; 1 *Nev. and M.* 52. *S. C.*

By section 82, all payments really and *bonâ fide* made, or which shall hereafter be made, by any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt (such payment not being a fraudulent preference of such creditor), shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and all payments really and *bonâ fide* made, or which shall hereafter be made *to* any bankrupt before the date and issuing of the commission against such bankrupt, shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and such creditor shall not be liable to refund the same to the assignees of such bankrupt, provided the person so dealing with the said bankrupt had not, at the time of such payment by or to such bankrupt, notice of any act of bankruptcy by such bankrupt committed.

It is not necessary that the payment should be of a precedent debt, to bring the case within the statute. Thus where A. purchased of B., a hop-merchant, a library, and paid him the value, B. at that time having committed an act of bankruptcy, of which A. had no notice, it was held that B. was protected by the above clause. *Hill v. Farnell*, 9 *B. and C.* 45. *See also Churchill v. Crease*, 5 *Bingh.* 177. *Bishop v. Crawshay*, 3 *B. and C.* 415. A payment by a partner who has committed an act of bankruptcy, of a partnership debt due before the bankruptcy, to a creditor, who has notice of the act of bankruptcy, is not protected by this statute. *Craven v. Edmondson*, 6 *Bingh.* 734; 4 *M. and P.* 622, *S. C.*

And where a trader who had committed a secret act of bankruptcy, assigned chattels to a creditor, as a security for money lent in trust to permit the trader to use the chattels till March, 1833, and then to sell them in discharge of the debt, if unpaid; and in October, 1832, within two months after

this assignment, a fiat issued, it was held that the assignment was not protected by sec. 82 of 6 Geo. 4. *Cannon v. Denew*, 10 *Bingh.* 292. A payment by procuring a person who is the creditor of the trader, to buy goods of the trader, and set off the amount in account with the creditor of the trader, is not as it seems a good payment within the statute. *Bradbury v. Anderton*, 1 *Crom. M. and R.* 486.

Though notice of a docket may not of itself be esteemed notice of an act of bankruptcy, yet connecting such a notice with the circumstance of the defendants' requiring security before they made the payment, a jury will be justified in finding the fact of notice. *Spratt v. Hobhouse*, 4 *Bingh.* 181

By section 83, the issuing of a commission shall be deemed notice of a prior act of bankruptcy (if an act of bankruptcy had been actually committed before the issuing of the commission), if the adjudication of the person or persons against whom such commission has issued shall have been notified in the London Gazette, and the person or persons to be affected by such notice may reasonably be presumed to have seen the same.

By section 84, no person, or body corporate, or public company, having in his or their possession, or custody, any money, goods, wares, merchandises, or effects, belonging to any bankrupt, shall be endangered by reason of the payment or delivery thereof to the bankrupt, or his order, provided such person or company had not, at the time of such delivery or payment, notice that such bankrupt had committed an act of bankruptcy.

By section 85, if any accredited agent of any body corporate or public company shall have notice of any act of bankruptcy, such body corporate or company shall be thereby deemed to have had such notice.

By section 86, no purchase from any bankrupt, *bonâ fide*, and for valuable consideration, where the purchaser had notice, at the time of such purchase, of an act of bankruptcy by such bankrupt committed, shall be impeached by reason thereof, unless the commission against such bankrupt shall have been sued out within twelve calendar months after such act of bankruptcy.

Evidence of set-off.]—The section of the new bankrupt act relative to set-off has been already given. *Ante, p.* 319. The term *mutual credit* is held to have a more extensive meaning than *mutual debt*. *Ex parte Prescott*, 1 *Atk.* 319. A mutual credit may be constituted, though the parties did not mean particularly to trust each other, as where a bill of exchange, accepted by A. gets into the hands of B., and B. buys goods of A., it is a mutual credit between A. and B. though A. did not

know that the bill was in B.'s hands. *Hankey v. Smith*, 3 *T. R.* 507 (*n*).

Where a partner in the house of M. and Co., bankers, drew bills for the accommodation of A., a customer of M. and Co., who discounted the bill for A., and N. and Co., to whom it was indorsed by M. and Co., discounted the bill for them; and on the bill becoming due after the bankruptcy of M. and Co., in consequence of the non-payment of the bill by A., N. and Co. paid themselves the amount of the bill out of the funds of M. and Co., in their hands; it was held to be a case of mutual credit between A. and M. and Co., and that the former might set off a debt due to him by M. and Co. in an action brought by their assignees on the bill. *Bolland v. Nash*, 8 *B. and C.* 105.

It is now settled that the term *mutual credit* is confined to such credits only as must, in their nature, *terminate in debts*; as where a debt is due by one party, and credit is given him on the other side for a sum of money, payable on a future day, and which will then become a debt: or where there is a delivery of property on one side with directions to turn it into money on the other; in such case the credit given by the delivery of the property must in its nature terminate in a debt, the balance will be taken on the two debts, and the words of the statute will, in all respects, be complied with; but where there is a mere deposit of property, without any authority to turn it into money, no debt can arise out of it, and, therefore, it is not a credit within the meaning of the statute. *Rose v. Hart*, 8 *Taunt.* 499, *Eden*, 193; *and see Easum v. Cato*, 5 *B. and A.* 861; *Rose v. Sims*, 1 *B. and Ad.* 521. Therefore a guarantee against contingent damages, which cannot terminate in a debt, is not the subject of a mutual credit. *Sampson v. Burton*, 2 *B. and B.* 89. These decisions are to be considered as authorities upon the new bankrupt act, though the words of that act are, that "one debt, *or demand*, may be set off against another." *Eden*, 194. *Ex parte Marshall*, 1 *Mont. and Ayr.* 139.

Where B. a creditor of A. employed him to repair a carriage, undertaking to pay *ready money* for the repairs, and A. afterwards became a bankrupt, it was held that his assignees might refuse to deliver up the carriage until payment of the amount of the repairs, and that there was not such a mutual credit as to deprive the assignees of their lien. *Clarke v. Fell*, 4 *B. and Ad.* 404, 1 *Nev. and M.* 244, *S. C.*

Evidence of set-off—nature of the debt due from the bankrupt to the creditor.] Although it is enacted by 6 Geo. 4, c. 16, s. 16, *vide ante*, that every debt, or demand, thereby made proveable against the estate of the bankrupt may also be set

off, yet the debtor of the bankrupt cannot, by procuring a debt due from the bankrupt to be assigned to him *after the bankruptcy*, entitle himself to set off such debt. Thus, where a holder of a promissory note of the bankrupt indorsed it, after a commission issued, to a debtor of the bankrupt's estate, it was held that it could not be set off by the indorsee. *Marsh v. Chambers*, 2 *Str*. 1234. *Ex parte Hale*, 3 *Ves*. 304. If the set-off arises on the indorsement of a bill to the defendant, he must show that the indorsement was made before the bankruptcy; *Lucas v. Marsh*, *Barnes*, 453; but where the set-off was founded on certain notes of the bankrupt, proof that notes of the bankrupt to the amount of the set-off came to the defendant's hands three or four weeks before the bankruptcy, was held sufficient evidence from which the jury might infer that he was in possession of them at the time of the bankruptcy, without identifying them with the notes produced. *Moore v. Wright*, 2 *Marsh*. 209, 6 *Taunt*. 517, *S. C.* The defendant cannot set off cash notes of the bankrupt, payable to J. S. or bearer, without showing that they came to his hands before the bankruptcy, though they bear date before that time. *Dickson v. Evans*, 6 *T. R.* 57. It is not sufficient, in order to establish a set-off, to prove that the defendant's demand has been allowed by the commissioners as a debt. *Pirie v. Mennet*, 3 *Campb*. 279. The 6 Geo. 4, c. 16, having made all debts which it has declared to be proveable to be also the subject of a set-off, it follows, that in all those cases in which set-off has been refused on the ground of the claim depending upon a contingency, such claim may now be set off. *Eden*, 203.

A person who receives a banker's notes, after he knows that he has stopped payment, but without knowing that he had committed an act of bankruptcy, is entitled to set off the amount. *Hawkins v. Whitten*, 10 *B. and C.* 217. *Dickson v. Cass*, 1 *B. and Ad.* 343.

If the holder of a bill drawn by the bankrupt set off the amount of it in account with a prior indorser, he cannot afterwards avail himself of it in an action against him by the assignees. *Belcher v. Lloyd*, 10 *Bingh*. 310. 8 *Moore and S.* 822, *S. C. stated ante, p.* 320.

Evidence of set-off—nature of the debt due from the creditor to the bankrupt.] With regard to the nature of the debt due from the creditor to the bankrupt, or the credit given by the bankrupt to the creditor, it must appear that the debt, or the credit, existed before the bankruptcy. Thus, if the holder of an acceptance buys goods from the acceptor, and the acceptor becomes bankrupt, the purchaser may set off the acceptance against the price of the goods. *Hankey v. Smith*, 3 *T. R.* 507 (*n*). Where A. bought of B. goods to the amount

of 430*l.* at six months' credit, and afterwards to the amount of 230*l.* at the same credit, and at the expiration of the first six months gave B. two bills of exchange, upon third persons, for 600*l.*, B. giving A. an undertaking to repay him the balance of 170*l.* upon the bills being paid, it was held, the bills being paid, and A. becoming bankrupt before the credit for the second parcel expired, that B. might set off the 170*l.* against the price of the second parcel. *Atkinson v. Elliott*, 7 *T. R.* 378. But where a bankrupt, previously to his bankruptcy, deposited a bill of exchange with the defendant, for the purpose of raising money thereon, and an advance was accordingly made, it was held that the assignees of the bankrupt were entitled to recover the bill, on tendering the money advanced, though a balance remained due to the defendant on a general account. *Key v. Flint*, 1 *B. Moore*, 451, 8 *Taunt.* 21, *S. C.* And where bankers had accepted bills for the accommodation of a trader, who after committing an act of bankruptcy, but before a commission sued out, lodged money with them to take up the bills, which, when due, were paid by the bankers, it was held that the bankers were bound to refund this money to the assignees, and could not set it off, for the 5 Geo. 2, c. 30, was confined to mutual credits, and mutual debts, "at any time before such person became bankrupt;" *Tamplin v. Diggins*, 2 *Campb.* 312; but now, by the new act (6 Geo. 4,) the debt is a subject of set-off, notwithstanding a prior act of bankruptcy, provided the defendant had no notice of such act.

The debt, or credit, must be due in the same right, as in every case of set-off. *Vide supra.* Where third persons, holding the acceptance of a trader who was known to be in bad circumstances, agreed with the defendants, as a mode of covering the amount of the bill, that it should be indorsed to them, and that they should purchase goods of the trader, which were to be paid for by a bill at three months' date, or made equal to cash in three months (before which time the trader's acceptance would be due,) but without communicating to the trader that they were the holders of his acceptance, it was held that the trader having become bankrupt, the defendants could not set off the amount of his acceptance, which they did not hold in their own right, but, in effect, as trustees for the other persons. *Fair v. M'Iver*, 16 *East*, 130. But where the defendant who had ordered goods for ready money, paid for them by returning to the vendor's agent a bill accepted by the vendor, which had been due and dishonoured before the goods were ordered, and the agent carried it home to the vendor, who kept it, and became bankrupt, the transaction was held equivalent to payment. *Mayer v. Nias*, 1 *Bingh.* 311.

Competency of Witnesses.

Bankrupt.] It is now a well-established rule (though the

principle of it has been doubted, *see* 2 *Phill. Ev.* 335, 2 *B. and C.* 18, *M'Cl. and Y.* 402), that a bankrupt, even after obtaining his certificate, and releasing his share of the surplus, is incompetent to prove any fact necessary to support the commission. He cannot, therefore, be called to prove the petitioning creditor's debt, *Chapman v. Gardiner*, 2 *H. Bl.* 279, *Cross v. Fox, ib.* (*n*); or to prove his own act of bankruptcy, *Field v. Curtis*, 2 *Str.* 829; or to disprove it, as where he was asked whether the assignment did, or did not, comprise the whole of his property, *Hoffman v. Pitt*, 5 *Esp*, 24, though, in a prior case, Lord Kenyon admitted the bankrupt to prove whether the arrest, which was said to be fraudulent, and an act of bankruptcy, was, in fact, a concerted or an adverse arrest. *Oxlade v. Perchard*, 1 *Esp.* 287. In a subsequent case, however, Mansfield, C. J., rejected the evidence of a bankrupt called to disprove his bankruptcy, and said that *Oxlade v. Perchard*, which was cited, had been overruled by Lord Ellenborough and himself at Guildhall. *Rabett v. Gurney*, 1 *Mont. B. L.* 482 (*n*), *ed.* 1805, *M'Cl. and Y.* 404. Nor can a bankrupt be called to prove a prior act of bankruptcy; *Wyatt v. Wilkinson*, 5 *Esp.* 187; and when called by the other side, he cannot be cross-examined as to any fact necessary either to support the commission, *Elsom v. Braily*, 1 *Selw. N. P.* 253. *Wyatt v. Wilkinson*, 5 *Esp.* 187; *but see Fletcher v. Woodmas*, 1 *Selw. N. P.* 253 (*n*); or tending to defeat it. *Binns v. Tetley*, *M'Cl. and Y.* 397. Nor can he be called to explain a doubtful act which may or may not be an act of bankruptcy. *Sayer v. Garnett*, 7 *Bingh.* 103, 4 *M. and P.* 734, *S. C.*

A bankrupt is not a competent witness to increase his estate, for his right to an allowance (depending on the dividends), and to the surplus, excludes him on the ground of interest. *B. N. P.* 43. *Butler v. Cooke, Cowp.* 70. But if the bankrupt has obtained his certificate, and has released his share in the surplus, and in the dividends, to his assignees, or has executed a general release to them, he is thereby rendered competent to increase the estate. *B. N. P.* 43, *Nares v. Saxby, cited* 2 *T. R.* 497; *and see Carlisle v. Eady*, 1 *C. and P.* 234. In an action on the statute 9 Anne, c. 14, by the assignee of a bankrupt, to recover money lost by the bankrupt at play, it was held that the bankrupt, who had obtained his certificate, was rendered a competent witness to prove the loss by three releases: 1, By the bankrupt to the assignee; 2, By all the creditors to the bankrupt; and 3, By the assignee, who was not a creditor, to the bankrupt: and it was also held, that a year after the commission issued, it might be presumed that all the creditors had proved, and that a release, signed by all who had proved, might therefore be considered as a release by all the creditors. *Carter v. Abbot*, 1 *B. and C.* 444. Where the witness has been twice bankrupt, his certificate under the

second commission, and a release to the assignees, will not make him a competent witness to increase the fund, unless he has paid 15*s*. under the second commission, for unless he pays that sum his future effects remain liable. *Kennett v. Greenwollers, Peake*, 3. In a suit against the crown, a release from the bankrupt to his assignees will not operate to make him a competent witness, the crown not being bound by the bankrupt law. *Crawford v. Attorney General*, 7 *Price*, 2.

A bankrupt may, however, be called to *diminish* the fund, though not certificated. *Butler v. Cooke, Cowp.* 70, *B. N. P.* 43. Where one of several defendants pleads his bankruptcy, and a *nolle prosequi* has been entered as to him, he is a competent witness for the other defendants, *ante, p.* 110.

So the bankrupt may be called to prove any fact except such as are material to support the commission, or to increase the estate, having obtained his certificate and released his surplus. He may, therefore, be called to prove the handwriting of the commissioners, in order to identify the proceedings. *Morgan v. Pryor*, 2 *B. and C.* 14. So Raymond, C. J., admitted a bankrupt to give evidence as to *the time* of an act of bankruptcy, though he refused him as a witness to prove the act. 12 *Vin. Ab.* 11, *pl.* 28.

In an action by the assignees against a creditor, who has levied under an execution against the bankrupt, the latter was held to be competent to prove the defendant's knowledge of his insolvency. *Reed v. James*, 1 *Stark.* 134. But in such case it seems that the bankrupt must be certificated and have released to his assignees, as his evidence goes to increase the estate. *See* 2 *Phill. Ev.* 336 (*n*).

The bankrupt's wife cannot be examined as to an act of bankruptcy committed by her husband. *Ex parte James*, 1 *P. Wms.* 611, 12 *Vin. Ab.* 11, *pl.* 28. Where the wife was called to prove that a promissory note had been paid to the defendants in contemplation of bankruptcy, Lord Kenyon held her to be a competent witness, inasmuch as if the plaintiff recovered, the defendants would be creditors against the estate to the amount of the note, and so the witness stood indifferent. *Jourdaine v. Lefevre*, 1 *Esp.* 66. But it has been observed, that in this case the witness appears to have been interested, inasmuch as the fund would be increased if the plaintiff succeeded, by the difference between the amount of the note and a dividend on a debt to the same amount, unless the estate should pay 20*s*. in the pound. *Eden*, 362. 2 *Stark. Ev.* 215.

Creditor.] A creditor is not a competent witness to increase the fund out of which he is to receive his dividends, and therefore he cannot be called to prove gaming by the bankrupt, and so to deprive him of his allowance. *Shuttleworth v. Bravo*, 1 *Str.* 507. Nor is a creditor a competent witness to support

the commission, which is to be considered as a benefit to the witness, since it brings a divisible fund within his reach. *Crooke v. Edwards*, 2 *Stark*. 302. *Adams v. Malkin*, 3 *Campb*. 543; *but see Williams v. Stevens*, 2 *Campb*. 301, *contra*. And it is immaterial that he has not proved. *Adams v. Malkin*, 3 *Campb*. 543; *Crooke v. Edwards*, 2 *Stark*. 302, *overruling Williams v. Stevens*, 2 *Campb*. 301. But a creditor is competent to overthrow the petitioning creditor's debt. *In re Codd*, 2 *Sch. and Lef*. 116. And where the bankrupt is a member of parliament who has committed an act of bankruptcy by not paying, securing, or compounding for his debt, a creditor is a competent witness, from necessity, to prove that the debt has not been paid, secured, or compounded for, but not to prove other circumstances which can be established *aliunde*. *Ex parte Harcourt*, 2 *Rose*, 203. A creditor may be rendered competent by a release to the assignees. *Koopes v. Chapman*, *Peake*, 19; *and see Sinclair v. Stevenson*, 1 *C. and P.* 582. So if he has sold his debt, or agreed to sell it, for he thereby becomes only a trustee for the assignee of the debt. *Granger v. Furlong*, 2 *W. Bl.* 1273. *Heath v. Hall*, 4 *Taunt.* 326.

The petitioning creditor is not a competent witness to show that the commission was regularly sued out. He enters into a bond to the Chancellor, conditioned to establish the several facts upon which the validity of the commission depends, and to cause it to be effectually executed. He has, therefore, a clear and direct interest in the question at issue. *Per Lord Ellenborough*, *Green v. Jones*, 2 *Campb*. 411. But he may be called to upset the commission, as by showing that the act of bankruptcy was concerted between himself and the bankrupt, and that there was no sufficient petitioning creditor's debt. *Loyd v. Stretton*, 1 *Stark*. 40. But the deposition of the petitioning creditor is sufficient proof of the debt, where no notice to dispute the bankruptcy has been given under 49 Geo. 3, c. 131. *Bisse v. Randall*, 2 *Campb*. 493.

In an action by a creditor of the bankrupt against the sheriff, for a false return to a writ of *fi. fa.* against the bankrupt's goods, where the defence was, that at the time of levy the party was bankrupt, the declarations of the petitioning creditor, made after the commission issued, have been admitted to disprove the existence of a good petitioning creditor's debt. *Young v. Smith*, 6 *Esp*. 121. *Dowden v. Fowle*, 4 *Campb*. 38. Upon the former case, however, Patteson, J., has observed, that it is loosely stated, and that the declarations must have been before the commission, and that, as to the latter, the fact of the petitioning creditor's having indemnified the sheriff is mentioned by Mr. Starkie as the principle of the decision. *Harwood v. Keys*, 1 *M. and R.* 205.

Commissioner and assignee.] Where a commissioner was called to support the commission, under which he had acted, on its being objected that he had received fees, and was liable to an action of trespass if the commission should be overturned, Lord Ellenborough observed, that he could not be called upon to refund the fees which he had received, and he permitted the witness to be examined, saying that he would not then pronounce upon the question. *Crook v. Edwards*, 2 *Stark.* 302. His interest in the future fees, which he might get if the commission were supported, seems not to have been noticed. *Eden*, 365.

An assignee who has released his claims upon the estate is competent to prove the petitioning creditor's debt. *Tomlinson v. Wilkes*, 2 *B. and B.* 397.

ACTIONS AGAINST BANKRUPTS.

In an action against a bankrupt, he may plead that the cause of action accrued before he became bankrupt, by 6 Geo. 4, c. 16, s. 126.

By that statute any bankrupt who shall, after his certificate shall have been allowed, be arrested, or have any action brought against him for any debt, claim, or demand, by that act made proveable under the commission against such bankrupt, shall be discharged upon common bail, and may plead in general that the cause of action accrued before he became bankrupt, and may give the act and the special matter in evidence, and such bankrupt's certificate, and the allowance thereof, shall be sufficient evidence of the trading, bankruptcy, commission, and other proceedings precedent to the obtaining such certificate. A certificate obtained after the above statute, on a commission issued before it, is proved by the production of the certificate duly allowed. *Taylor v. Welsford, M. and M.* 503. A certificate of conformity under a fiat must appear to have been entered of record in the court of bankruptcy. 2 *and* 3 *Wm.* 4, *c.* 114, *s.* 8, *ante, p.* 556.

By section 127, if the party has been bankrupt before, and has not paid 15*s.* in the pound under the second commission, his person only is protected by the certificate, and his future effects vest in the assignees. But notwithstanding this section, a debt which ought to have been proved under the second commission is barred by the certificate. *Robertson v. Score*, 3 *B. and Ad.* 338.

And by 6 Geo. 4, c. 16, s. 130, no bankrupt shall be entitled to his certificate, or to be paid any allowance, and any certificate, if obtained, shall be void, if such bankrupt shall have lost, by any sort of gaming or wagering, in one day 20*l.*,

or within one year next preceding his bankruptcy 200*l*., or if he shall within one year next preceding his bankruptcy have lost 200*l*. by any contract for the purchase or sale of any government or other stock, where such contract was not to be performed within one week after the contract, or where the stock bought or sold was not actually transferred or delivered, in pursuance of such contract, or shall, after an act of bankruptcy committed, or in contemplation of bankruptcy, have destroyed, altered, mutilated, or falsified, or caused to be destroyed, altered, mutilated, or falsified, any of his books, papers, writings, or securities, or made, or been privy to the making of any false or fraudulent entries in any book of account, or other document, with intent to defraud his creditors, or shall have concealed property to the value of 10*l*. or upwards, or if any person having proved a false debt under the commission, such bankrupt being privy thereto, or afterwards knowing the same, shall not have disclosed the same to his assignees within one month after such knowledge.

A loss by gaming invalidates a certificate, though the bankrupt on the same day wins more than he loses. *Ex parte Newman*, 2 *Glynn and J*. 329.

The defence of bankruptcy cannot be given in evidence under the general issue, but must be pleaded in the form prescribed by the statute. *Gowland v. Warren*, 1 *Campb*. 363. Under that plea a certificate allowed after the commencement of the suit, but before plea pleaded, may be given in evidence; *Harris v. James*, 9 *East*, 82; but if allowed after plea pleaded, it is inadmissible; *Langmead v. Beard, cited* 9 *East*, 85; but should be pleaded *puis darrein continuance*. The allowance, it has been said, needs no proof, the judges taking cognizance judicially of the handwriting of the Chancellor. *Eden*, 426. The certificate cannot be given in evidence unless entered of record in the manner required by 6 Geo. 4, c. 16, s. 95, 96. *Ibid, supra*. If a commission issue against a person by a wrong name, and he obtains his certificate under it, and an action is afterwards brought against him in his right name, on a plea of bankruptcy, he may show that he is the person against whom the commission issued, and that he has gone by the name by which he is described in the commission. *Stevens v. Elizee*, 3 *Campb*. 256.

Where issue was joined on the fact of a discharge under a former commission, the affidavit of conformity was held to be good secondary evidence of the certificate, after a notice to produce. *Graham v. Grill*, 4 *Campb*. 282. So where to prove that the defendant, who pleaded his bankruptcy, had been before discharged as a bankrupt, a witness stated that he had been employed by the defendant to solicit his certificate, and that looking at the entries in his books he had no doubt that it had been allowed by the Lord Chancellor, it was held suffi-

cient, notice to produce the certificate having been given; but it was ruled that the book in the bankrupt office containing entries of the allowance of certificates was not sufficient secondary evidence. *Henry v. Leigh*, 3 *Campb.* 499.

In answer to the plea of bankruptcy and certificate, the plaintiff may show that the defendant had before been a bankrupt, and had not paid 15*s.* in the pound under the second commission, and it is sufficient for the plaintiff to produce the commission and the proceedings, and to show that the defendant submitted to them. *Haviland v. Cooke,* 5 *T. R.* 655, 2 *Christ. B. L.* 670.

Evidence on plea of bankruptcy, what debts barred by certificate.] A certificate under a joint commission may be given in evidence in an action for a separate debt, and *vice versâ*. *Horsey's case*, 3 *P. Wms.* 23, *Ex parte Yale, id.* 24 (*n*). By the statute, any debt, claim, or demand, made proveable under the commission, is discharged by the certificate, but these words do not include a debt due to the crown. *Anon.* 1 *Atk.* 262, *Eden*, 413. Some demands which are not proveable under the commission, are barred by the certificate. Thus the costs of an action, *ex contractu*, where there is no verdict before the bankruptcy, are not proveable under the commission, but are barred by the certificate. *Ex parte Hill*, 11 *Ves.* 646. *Ex parte Poucher*, 1 *G. and J.* 386. So where on the reference of a cause, the arbitrator made his award against the plaintiff, who became bankrupt before the costs were taxed, and judgment signed, the costs were held not to be proveable under the commission. *Haswell v. Thorowgood*, 7 *B. and C.* 705. But where interlocutory costs, ordered to be paid by the bankrupt, are taxed before the bankruptcy, the certificate is a discharge, *Jacobs v. Phillips*, 1 *Crom. M. and R.* 195. 4 *Tyr.* 652, *S. C.* A claim for unliquidated damages merely is not proveable under the commission, and is not barred by the certificate, and therefore, where the plaintiff sues the defendant in trespass for seducing his daughter, and judgment is not signed until after the bankruptcy, though the verdict be before it, the certificate is no bar; *Buss v. Gilbert*, 2 *Maule and S.* 70; *ex parte Charles*, 14 *East*, 197; and in an action of *tort* for not selling stock according to orders, bankruptcy and certificate are no defence. *Parker v. Crole*, 5 *Bingh.* 63. Where A. covenants that B. shall pay the premium upon a policy of insurance, damages for the non-payment are not proveable under a commission against A., and consequently not barred by his certificate. *Atwood v. Partridge*, 4 *Bingh.* 209. But where a *debt* exists before the bankruptcy, and a verdict is obtained, and costs are taxed *after* the bankruptcy, the costs are considered as part of the original debt, and that being barred by the certificate, the costs are barred with it. *Lewis v. Piercy*,

1 *H. Bl.* 29. Costs even in *tort*, where the bankruptcy was during the term of which the judgment was signed generally, were held to be barred by the certificate. *Greenway v. Fisher*, 7 *B. and C.* 436. *See Bire v. Moreau*, 4 *Bingh.* 57. But now by the rules of H. 4 W. 4, the judgment must be signed of the particular day. Where a debt is contracted in a foreign country, a discharge (as by a certificate), according to the law of that country, is a bar to an action brought in our own courts; *Ballantine v. Golding*, *Co. B. L.* 347, 1*st ed.*, *Potter v. Brown*, 5 *East*, 124; but not so where, by the foreign law, the *remedy* only is barred; *Williams v. Jones*, 13 *East*, 439; nor is a foreign bankruptcy and certificate a bar to a demand for a debt contracted in England. *Smith v. Buchanan*, 1 *East*, 6; *see* 2 *H. Bl.* 553 (*n*), 4*th ed.*

Evidence on plea of bankruptcy, in answer to plea.] Where the general plea of bankruptcy is pleaded, which concludes to the country, the plaintiff can only reply the *similiter*, *Wilson v. Kemp*, 2 *Maule and S.* 549, *Hughes v. Morley*, 1 *B. and A.* 22; and under this replication the plaintiff may give in evidence any matters which by 6 Geo. 4, c. 16, s. 130, *ante, p.* 578, render the certificate void. *Ibid.*

Evidence of subsequent promise.] By 6 Geo. 4, c. 16, s. 131, no bankrupt, after his certificate shall have been allowed under any present or future commission, shall be liable to pay or satisfy any debt, claim, or demand from which he shall have been discharged by virtue of such certificate, or any part of such debt, claim, or demand, upon any contract, promise, or agreement, made or to be made after the suing out of the commission, unless such promise, contract, or agreement be made in writing, signed by the bankrupt, or by some person thereto lawfully authorised in writing by such bankrupt. The initial of the defendant's surname is not a sufficient signature within this clause. *Hubert v. Moreau*, 2 *C. and P.* 528.

ACTIONS AGAINST CONSTABLES AND REVENUE OFFICERS.

By 24 Geo. 2, c. 44, s. 6, no action shall be brought against any constable, headborough, or other officer, or against any person or persons acting by his order and in his aid, for any thing done in *obedience to any warrant* under the hand or seal of any justice of the peace, until demand hath been made or left at the usual place of his abode by the party or parties intending to bring such action, or by his, her, or their attorney or agent, in writing, signed by the party demanding the same,

of the perusal and copy of such warrant, and the same hath been refused or neglected for the space of six days after such demand; and in case after such demand and compliance therewith, by showing the said warrant to, and permitting a copy to be taken thereof by the party demanding the same, any action shall be brought against any such constable, &c., without making the justice or justices who signed or sealed the said warrant defendant or defendants, that on producing and proving such warrant at the trial of such action, the jury shall give their verdict for the defendant or defendants, notwithstanding any defect of jurisdiction in such justice or justices. And if such action be brought jointly against such justice or justices, and also against such constable, &c., then on proof of such warrant the jury shall find for such constable, &c., notwithstanding such defect of jurisdiction as aforesaid.

What persons are within the statute.] Churchwardens and overseers of the poor taking a distress for poor's rate are entitled to the protection of the statute. *B. N. P.* 24, *Harper v. Carr*, 7 *T. R.* 271. So a gaoler, who receives and detains a prisoner under the warrant of a magistrate. *Butt v. Newman*, *Gow*, 97. This section is obviously intended to protect the officer in those cases only where the justice remains liable, and it is necessary, in order to bring the officer within it, that he should act most strictly in obedience to his warrant. *Per Abbott, C. J.*, *Parton v. Williams*, 3 *B. and A.* 333. Therefore, where an officer apprehends a different person from him described in the warrant he is not protected. *Money v. Leach*, 3 *Burr.* 1742, 2 *Maule and S.* 260. So where a constable having a warrant to search for 100lbs. weight of cotton cops which had been stolen, took also a tin pan and sieve which were claimed by the party robbed, but were not mentioned in the warrant, nor likely to furnish evidence of the identity of the articles stolen. *Crozier v. Cundey*, 6 *B. and C.* 232. So where, not acting in obedience to the warrant, he executes it out of the jurisdiction of the magistrate by whom it is granted. *Milton v. Green*, 5 *East*, 233. So also where, in executing a warrant of distress, he enters a house and breaks the windows, &c. *Bell v. Oakley*, 2 *Maule and S.* 259. But it will not deprive the officer of the protection of the statute that the warrant was illegal, provided he acted in obedience to it. *Price v. Messenger*, 2 *B. and P.* 158. Where a statute provides that for any thing done in pursuance of that act, notice shall be given before action commenced, such notice is only necessary in those cases, in which the party against whom the action is brought has reasonable ground to suppose that the thing done by him is done in execution of, or under the authority of the act. *Cooke v. Leonard*, 6 *B. and C.* 351.

By a local act for paving, lighting, watching, and improving

the town of L. certain commissioners were appointed, and by section 11, were authorised to appoint by writing a treasurer and clerk, and also all such surveyors, scavengers, rakers, &c. beadles, *constables*, *watchmen*, and other officers, deputies, or assistants, for the execution of the purposes of the act, as they should from time to time think proper. By section 77, the commissioners were also empowered to appoint such number of able-bodied men as they should think proper to be employed as watchmen during the night time, and it was enacted that it should be lawful for such watchmen, and they were thereby required in their respective stations to apprehend and secure all malefactors, &c., and all suspected persons who should be found wandering or misbehaving themselves during the hours of keeping watch. By section 78, the watchmen were to be sworn as constables, and were to be invested with like powers and authorities, &c., as any constables were invested with or enjoyed by law. By section 168, it was enacted, that no action, suit, or information, should be commenced *against any person or persons for any thing done or to be done by virtue of that act*, until one calendar month's notice thereof should have been first given in writing to the clerk of the commissioners of the cause of action, nor at any time whatsoever after sufficient satisfaction or tender should have been made. It was held, first, that the section requiring notice to be given was not confined to acts done, or directed to be done, by the commissioners, but extended to acts done by constables and watchmen; secondly, that evidence of the defendants acting as constables and watchmen, was *primâ facie* evidence of their being entitled to the protection of the act without other proof of their appointment; and thirdly, that where the watchmen had reasonable ground of suspicion that felony had been committed by the plaintiff, and went to the plaintiff's house to apprehend him for such felony, but beat him, and used much more violence than was necessary, they were protected by the section requiring notice. *Bulter v. Ford*, 1 *Crom. and M.* 662, 3 *Tyr.* 677, *S. C.*

The act 24 G. 2, only extends to warrants of justices of the peace, and not to a warrant granted by a judge of the King's Bench. *Gladwell v. Blake*, 1 *Crom. M. and R.* 636.

What actions are within the statute.] The act only extends to actions of tort, and therefore where an action for money had and received was brought against an officer who had levied money on a conviction which had been quashed, it was held, that a demand of a copy of the warrant was not necessary. *B. N. P.* 24. Replevin is not an action within the statute. *Fletcher v. Wilkins*, 6 *East*, 283, 4 *B. and C.* 211.

Evidence of demand.] The demand may be proved by the production of a duplicate original without a notice to produce; *Jory v. Orchard*, 2 *B. and P.* 39; and it is sufficient if the demand be signed by the plaintiff's attorney. *Ibid.* Where the declaration does not charge the defendants as officers, the plaintiff need not, in the first instance, prove a demand of a copy of the warrant. If the defendants mean to justify under the warrant, that proof lies upon them, and when they come to that part of the case the plaintiff must prove a demand. *Price v. Messenger*, 3 *Esp.* 96.

If the constable refuse or neglect, for the space of six days, to comply with the demand, the constable may be sued as before the statute. But if he complies with the demand at any time before action brought, though more than six days after the demand, he will be within the protection of the act. *Jones v. Vaughan*, 5 *East*, 445.

Limitation of action.] By 24 Geo. 2, c. 44, s. 8, no action shall be brought against any justice of the peace for any thing done *in the execution of his office*, or against any constable, headborough, or other officer or person acting as aforesaid, unless commenced within six calendar months after the act committed. The object of this section differs from that of the sixth section (*vide supra*), being intended for the benefit of persons who intend to act right, but by mistake act wrong. *Per Abbott, C. J., Parton v. Williams*, 3 *B. and A.* 333. And the officer is entitled to the protection of this section of the statute, provided he acts *bonâ fide* in his character of officer, and under a belief that he is discharging the duty with which he is invested. *Per Bayley, C. J., id.* 338. Therefore, where some constables, under a warrant to search for black cloth which had been stolen, finding no black cloth, took cloth of other colours, and carried it before a magistrate, refusing at the same time to tell the owner of the house searched whether they had any warrant to do so; it was held, that they were within this section of the statute, and that the action ought to have been commenced within six months. *Smith v. Wiltshire*, 2 *B. and B.* 619. And so where a constable acting under a warrant, commanding him to take the goods of A., took the goods of B., believing them to belong to A., it was held, that the action must be brought within six months. *Parton v. Williams*, 3 *B. and A.* 330. It was ruled by Lord Kenyon, in *Postletwhaite v. Gibson*, 3 *Esp.* 226, that a constable taking a person into custody on suspicion of felony, without a warrant, was not within the protection of this section; but on this decision being cited, it was said by Abbott, C. J., that if it were necessary to determine this question, he should wish for time to consider it. *Parton v. Williams*, 3 *B. and A.* 334. And the opinion of Lord Kenyon has likewise been

questioned in another decision. *Smith v. Wiltshire*, 2 *B. and B.* 622. Where a constable acts *colore officii*, and not *virtute officii*, he is not protected by the statute; where the act committed is of such a nature that the office gives him no authority to do it, in the doing of that act he is not to be considered as an officer; but where a man doing an act within the limits of his official authority, exercises that authority improperly, or abuses the discretion placed in him, to such cases the statute extends. *Per Lord Kenyon*, *Alcock v. Andrews*, 2 *Esp.* 542, (*n*). *Cooke v. Leonard*, 6 *B. and C.* 351, *supra*.

Venue.] By 21 Jac. 1, c. 12, s. 5, if any action upon the case, trespass, battery, or false imprisonment, shall be brought against any justice of peace, mayor, or bailiff of city or town corporate, headborough, portreve, constable, tithing-man, collector of subsidy or fifteens, churchwardens and persons called sworn men, executing the office of churchwarden or overseer of the poor, and their deputies, or any of them, or any other which in their aid and assistance, or by their commandment, shall do any thing touching or concerning his or their office or offices, for or concerning any matter, cause, or thing, by them, or any of them, done by virtue or reason of their or any of their office or offices, the said action shall be laid within the county where the trespass or fact shall be done and committed, and not elsewhere; and it shall be lawful to and for all and every person and persons aforesaid, to plead the general issue, and give the special matter in evidence.

A constable who imprisons a person on suspicion of felony. without any reasonable grounds, of his own authority, without warrant, is within this statute; and a private person, who acts in aid of the constable, is also within it; but if he acts, not merely in aid, but as a prime mover, and principal (which is a question for the jury), the statute does not apply to him. *Staight v. Gee*, 2 *Stark.* 445. Where the prosecutor, who had obtained the warrant, pointed out the party to the constables, Lord Ellenborough was of opinion that he was acting in their aid within the meaning of the statute. *Nathan v. Cohen*, 3 *Campb.* 257. But where A. sent for B., a constable, and gave the plaintiff in charge for a felony, Bayley, J., ruled that A. was not within the statute, and must plead specially. *M'Cloughan v. Clayton*, *Holt*, 478.

Evidence of arrest.] In actions against constables it sometimes becomes a question whether the evidence is sufficient to establish an arrest. Where the constable went with the warrant to the plaintiff's house and showed it to him, and after some conversation the plaintiff attended the constable to the magistrate, by whom the charge was dismissed, the constable

having never touched the plaintiff, it was held that this was no arrest, for that the plaintiff went voluntarily before the magistrate. *Arrowsmith v. Le Mesurier*, 2 *Bos. and Pul. N.R.* 211. So where the officer told the party that he had a writ against him, to which the latter replied, "Very well, I will come to you immediately," but kept his seat, and on the officer quitting the room, made his escape, it was ruled by Abbott, C. J., to be no arrest. *Russen v. Lucas, R. and M.* 26. But where the constable said to the plaintiff, "You must go with me," on which the plaintiff said he was ready to go, and went with the constable towards a police office, without being seized or touched, this was ruled to be an imprisonment; *and per Abbott, C. J.*, "if a person send for a constable, and give another in charge for felony, and the constable tell the party charged that he must go with him, on which the other, in order to prevent the necessity of actual force being used, expresses his readiness to go, and does actually go, this is an imprisonment." *Pocock v. Moore, R. and M.* 321. *Chinn v. Morris*, 2 *C. and P.* 361. *See more as to arrests, ante, p.* 386. The law on this point was thus laid down by Eyre, C. J., in *Simpson v. Hill*, 1 *Esp.* 431, (*see* 1 *M. and R.* 215): "If the constable, in consequence of the defendant's charge, had for one moment taken possession of the plaintiff's person, it would be in point of law an imprisonment; as, for example, if he had tapped her on the shoulder and said, "You are my prisoner," *or if she had submitted herself into his custody*, such would be an imprisonment; but the merely giving her in charge, without taking possession of the person, *where nothing more passes than merely the charge*, is not by law a false imprisonment." In the following case, the circumstances were held to constitute an imprisonment. The plaintiff appeared before the defendant, a magistrate, to answer the complaint of A. for unlawfully selling his dog. The defendant advised the plaintiff to settle the matter, by paying a sum of money, which the plaintiff declined. The defendant then said, "he would convict the plaintiff in a penalty under the trespass act, in which case he would go to prison." The plaintiff still declined paying, and said he would appeal. The defendant then called in a constable, and said, "Take this man out, and see if they can settle the matter; and if not, bring in him again, as I must proceed to commit him under the act." The plaintiff then went out with the constable, and settled the matter, by paying a sum of money; it was held, that this was an assault and false imprisonment, for which trespass would lie; and which, as no conviction had been drawn up, the defendant could not justify. *Bridget v. Coyney*, 1 *Mann. and R.* 211. Where a sheriff's officer having a warrant to arrest A. sent a message to A. to fix a time to call and give a bail bond, and A. fixed a time, attended

and gave bail, in an action for malicious arrest, this was held to be no arrest. *Berry v. Adamson*, 6 *B. and C.* 528. *See ante, p.* 387.

Defence.

A constable, having reasonable cause to suspect that a felony has been committed, is justified in arresting the party suspected, though it afterwards appear that no felony has been committed. *Beckwith v. Spicer*, 6 *B. and C.* 635. *Davis v. Russell*, 5 *Bingh.* 354.

Actions against Officers of Customs or Excise.

By 28 Geo. 3, c. 37, s. 25, no writ or process shall be sued out against any officer of the customs or excise, or against any person or persons acting by his or their order, in his or their aid, for any thing done in the execution, or by reason of that or any other act or acts of parliament then in force, or thereafter to be made relating to the said revenues, or either of them, until one calendar month next after notice in writing shall have been delivered to him or them, or left at the usual place of his or their abode by the attorney or agent for the person who intends to sue out such writ or process as aforesaid, in which notice shall be clearly and explicitly contained the cause of action, the name and place of abode of the person or persons in whose name such action is intended to be brought, and the name and place of abode of the said attorney, or agent. By section 27, the plaintiff shall not give evidence of any cause of action not contained in the notice.

Under the prior act, 23 Geo. 3, c. 70, s. 30, it was held that an excise officer was protected by this statute for an act not warranted by his official capacity, if done, *bonâ fide*, in the supposed execution of his duty, such as assaulting an innocent person whom he suspected to be a smuggler. *Daniel v. Wilson*, 5 *T. R.* 1. But a constable, who seized a person by direction of a custom-house officer, who had himself no power to seize, was held not to be within the protection of the act. *Norton v. Miller*, 2 *Chitty*, 140. And where a revenue officer seizes goods as forfeited, which are not liable to seizure, and takes money to release them, an action for money had and received will lie to recover it back without a month's notice. *Irving v. Wilson*, 4 *T. R.* 485, 2 *B. and C.* 737, 4 *B. and C.* 211. The intent of the notice is, that the defendant may know where to find the plaintiff, in order to tender him amends on the receipt of the notice. *Per Lawrence, J., Williams v. Burgess*, 3 *Taunt.* 129. A description of the plaintiffs in the notice as, "*late* of Rotherhithe, in the county of Surrey," has been held sufficient. *Wood v. Folliott*, 4 *B. and P.* 552 (*n*).

Limitation of action.] If any action or suit shall be brought or commenced against any person or persons, for any thing by him or them done, in pursuance of that or any other act or acts of parliament then in force, or thereafter to be made, relating to his majesty's revenues of customs and excise, such action, or suit, shall be commenced within three months next after the matter or thing done. 28 Geo. 3, c. 27, s. 23. Under this section the action must be commenced within three *lunar* months. *Croker v. M'Tavish*, 1 *Bingh.* 307.

The defendant may plead the general issue, and give the special matter in evidence. 23 Geo. 3, c. 70, s. 33, 24 Geo. 3, sess. 2, c. 47, s. 55.

ACTIONS BY EXECUTORS AND ADMINISTRATORS.

Where an action is brought by an executor or administrator, in his representative capacity, he must first (unless it be admitted on the pleadings), and now by the rules of H. 4 W. 4, it is to be taken as admitted, unless specially denied, prove himself to be executor or administrator, and then establish the cause of action, as in other suits.

By the late statute for the further amendment of the law, 3 and 4 W. 4, c. 42, additional remedies are given to and against executors and administrators. By the 2d section of that statute, reciting that there is no remedy provided by law for injuries to the real estate of any person deceased, committed in his lifetime, nor for certain wrongs done by a person deceased, in his lifetime, to another in respect of his property, real or personal; it is enacted, that an action of trespass, or trespass on the case, as the case may be, may be maintained by the executors or administrators of any person deceased for any injury to the real estate of such person, committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person; and the damages, when recovered, shall be part of the personal estate of such person; and further, that an action of trespass, or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased, for any wrong committed by him in his lifetime to another in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the adminis-

stration of the estate and effects of such person; and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debts of such person.

Evidence of title, as executor or administrator, where necessary.] Even before the new rules, where the plaintiff declared as executor or administrator, upon a cause of action arising in the time of his testator or intestate, and made *profert* of the probate or letters of administration, the defendant could not, under the general issue, deny the title of the plaintiff as executor or administrator. Thus in an action of assumpsit by an administrator, on promises to the intestate, the plea of *non assumpsit* admitted, as it now admits, the title of the plaintiff as administrator, and the defendant was not allowed to insist on the production of the letters of administration, or to object that they were not duly stamped; *Thynne v. Prothero*, 2 *Maule and S.* 553; nor that the supposed intestate had made a will and appointed an executor. *Marsfield v. Marsh*, 2 *Ld. Raym.* 824. So in an action of trover by an administrator, on the possession of his intestate, if the defendant pleaded the general issue, he was not allowed to controvert the title of the plaintiff as administrator. *Ibid.* The plea of the general issue, however, only admits the title stated in the declaration, and; therefore, if that title be insufficient, the plaintiff cannot recover. Thus in an action by an administrator, on a judgment recovered by his intestate in the King's Bench at Westminster (which is *bonum notabile* in Middlesex), where the plaintiff made *profert* of letters of administration from the archdeacon of Dorset, and the defendant pleaded a plea which admitted the letters of administration, it was held, on motion in arrest of judgment, that in order to enable the plaintiff to recover, he ought to have had letters of administration from the Bishop of London, and that the plea only admitted the plaintiff's title as stated, which was an insufficient title. *Adams v. terretenants of Savage*, 6 *Mod.* 134.

Where the plaintiff declares upon a cause of action arising in the time of his testator, or intestate, and the defendant wishes to controvert his title as executor or administrator, he must do so by plea; where the plaintiff alleged in the declaration that administration of all and singular the goods and chattels belonging to the intestate at the time of his death, was granted to him by the Bishop of Chester, and the defendant, after craving oyer of the letters of administration, pleaded that the plaintiff had never been administrator of all and singular the goods and chattels of the intestate in manner and form as the plaintiff had in her declaration in that behalf alleged, upon which issue was joined, it was held upon this form of plea, that the only fact put in issue was, whether the

letters of administration mentioned in the declaration were duly granted, and that the question, whether the defendant resided in the diocese of Chester at the time of the death of the intestate, constituted no part of the issue. If the defendant intended to insist that he did not reside in that diocese at the time, and that therefore the administration did not operate upon his debt, he ought to have pleaded the fact specially. *Stokes v. Bate*, 5 *B. and C.* 491.

Formerly where the plaintiff, executor, or administrator, declared on a cause of action arising in his own time, and made *profert* of the probate or letters of administration, and the defendant pleaded the general issue, such plea did not admit the plaintiff's title as executor or administrator, and it must have been proved. Thus, where the plaintiff declared as administrator, in an action of trover, on a conversion in his own time, it was held, that the plea of *not guilty*, did not admit his title as administrator, and that as the letters of administration were not properly stamped (*vide ante, p.* 146), he could not recover. *Hunt v. Stevens*, 3 *Taunt.* 113; *but see Watson v. King*, 4 *Campb.* 272. But now, since the new rules, the character in which the plaintiff sues on the record, is admitted by the plea of the general issue. *Ante, p.* 588. If the plaintiff could have proved himself in actual possession of the goods for which the action was brought, it seems that it would not have been necessary for him to give evidence of the letters of administration, if the action were against a mere wrong-doer, any possession in such case being sufficient, *see ante, p.* 507, *Peake Ev.* 395.

Where on a plea denying the representative character of the plaintiff, it becomes necessary to prove the plaintiff's title as executor or administrator, the probate or letters of administration must be produced, *see ante, p.* 77.

Where the grant of letters of administration is merely void, the plaintiff cannot recover, but it is otherwise where it is only voidable. Where the grant of letters of administration is by the archbishop, and there are no *bona notabilia* within his province, such grant is merely void, for each archbishop has supreme jurisdiction, and neither of them can act within the province of the other. *Shaw v. Staughton*, 2 *Lev.* 86, *Hardr.* 216, *Com. Dig. Administration* (*B.* 3). Where there are *bona notabilia* in one diocese of a province, the administration belongs to the bishop of that diocese, but if the metropolitan of that province, in which such diocese is, grants administration, such grant is voidable only, and not void, for it is in force till reversed by sentence, since the metropolitan has jurisdiction over all the dioceses within his province. 3 *Bac. Ab.* 37, *Com. Dig. Administration* (*B.* 3). Where there are *bona notabilia* in two dioceses of the same province, the grant of administration belongs to the archbishop. *Com. Dig. Administration* (*B.* 3), 5 *B. and C.* 493. And where a man dies intestate,

leaving *bona notabilia* in the several provinces, administration shall be granted by each archbishop for the goods in his province. *Com. Dig. ubi sup.* If the testator dies *in itinere*, the goods he has about him shall not make his testament liable to the prerogative court. 92 *Canon, Jac.* 1, *Doe v. Ovens*, 2 *B. and Adol.* 423.

Bona notabilia are goods to the value of 5*l.* 93 *Canon, Jac.* 1, *Com. Dig. Administration* (*B.* 4). Debts on recognizances, statutes, or judgments, are *bona notabilia* where they were acknowledged or given. *Ibid.* (*B.* 4). Specialties, as bond debts, are *bona notabilia* in the diocese where they are found at the time of the testator or intestate's death. *Ibid.* But debts by simple contract, as a bill of exchange; *Yeomans v. Bradshaw*, *Carth.* 373; are *bona notabilia* in the province in which the debtor resides at the time of the testator's death. *Com. Dig. Administration* (*B.* 4). A lease or term for years is *bona notabilia* in the diocese in which the lands lie. *Ibid.* But lands devised to executors for payment of debts and legacies are not *bona notabilia.* 11 *Vin. Ab.* 80.

Whether the defendant, when he denies the title of the plaintiff as executor, can show that *probate* has been granted by the ordinary, where it ought to have been granted by the metropolitan, appears to be doubtful. If such grant be *void*, then it would be good evidence under the plea, that the plaintiff is not executor. It is clear that *administration* granted by a bishop or other inferior judge, when it does not belong to him, is void; *Com. Dig. Administration* (*B.* 5); and in one case it is said, that a probate by the diocesan in case of no *bona notabilia* is void, but a prerogative probate, where there are no *bona notabilia* is only voidable; *R. v. Loggan*, 1 *Str.* 75; but Lord Macclesfield appears to have been of opinion, that a probate granted by an inferior judge is not *void*, but only voidable until reversed. *Comber's case*, 1 *P. Wms.* 767. 1 *Saund.* 275, *a* (*n*). The reason given for the distinction by Lord Macclesfield is, that an executor takes his authority from the will, but an administrator from the ordinary. Whether the probate be void or not, seems to depend on the fact of the ordinary having or not having jurisdiction. The metropolitan has a jurisdiction throughout his province, but the ordinary only in his diocese, and if there be no *bona notabilia* there, he has no jurisdiction, and the probate would seem to be void. So it is said in *Buller's Nisi Prius*, 247, that the adverse party may prove that the testator left *bona notabilia*, against the probate by an inferior court, for then such court had no jurisdiction; *and see Allen v. Dundas*, 3 *T. R.* 131.

Where in an action on a cause of action arising in the executor's own time, and in which he is not named executor, or where the title of the plaintiff as executor has been denied by

the defendant in his plea, it is good evidence that the probate was forged. *B. N. P.* 247, *ante, p.* 128.

In an action brought by several as executors, probate granted to one only of a will appointing all is evidence of the title of all. *Walters v. Pfeil, M. and M.* 362. In an action against several executors, to take the case out of the statute of limitations as to all, there must be an express promise in writing by all. *Tullock v. Hanley, R. and M.* 416. 9 *Geo.* 4, *c.* 14, *ante, p.* 326.

Defence.

It has been already stated in what cases the defendant may give evidence to disprove the title of the plaintiff as executor or administrator. With regard to the cause of action, the evidence in defence will be the same as in an action between the defendant and the testator or intestate. But on a plea of the statute of limitations to a declaration containing only counts on promises to the testator, the plaintiff will not be allowed to give evidence of promises or acknowledgments to himself, after the death of the testator. *Dean v. Crane,* 6 *Mod.* 309. *Surell v. Wine,* 3 *East,* 409.

Evidence of payment.] Payment of a debt to an executor who has obtained probate of a forged will, is a discharge in an action brought against the debtor by the rightful administrator on revocation of the probate. *Allen v. Dundas,* 3 *T. R.* 125. But a payment of money under the probate of a supposed will of a living person would be void; because, in such case, the ecclesiastical court has no jurisdiction, and the probate can have no effect. *Id.* 130; *and see Woolley v. Clark,* 5 *B. and A.* 744.

Evidence in action against executor de son tort.] In an action of trover or trespass by a rightful executor or administrator, against an executor *de son tort,* the latter may, under the general issue, and in mitigation of damages, give evidence of payments made by himself in the rightful course of administration; but should those payments amount to the full value of the goods claimed, the plaintiff will still, as it seems, be entitled to a verdict for nominal damages. *See ante, p.* 528; *but see Woolley v. Clark,* 5 *B. and A.* 744. *supra.* And such payments shall not be allowed in damages, if there be a failure of assets, and the lawful executor would by these means be divested of his right of preferring one creditor to another, of equal rank, or giving himself the same preference. 2 *Bl. Com.* 508. *Off. Ex.* 182. *Toller,* 365.

The non-joinder, as plaintiff, of another executor, must be pleaded in abatement, and cannot be given in evidence under

the general issue. *Com. Dig. Abatement* (*E.* 13). 1 *Saund.* 291, *i* (*n*).

Competency of Witnesses.

In an action at the suit of an executor or administrator, the estate of the testator or intestate being insolvent, a person who had an unsatisfied demand upon it, was ruled by Lord Ellenborough to be an incompetent witness for the plaintiff; *Craig v. Cundell*, 1 *Campb.* 381; but on a plea of *plene administravit* to an action against an administratrix, an unsatisfied creditor of the intestate was ruled by Parke, J., to be a competent witness for the defendant; Parke, J., observing that he could not understand the principle on which the former case proceeded. *Davies v. Davies*, *M. and M.* 345. And where the estate is insolvent, the creditor is clearly a competent witness. *Paull v. Brown*, 6 *Esp.* 34. In an action by an executor, a paid legatee is a competent witness to increase the estate. *Clarke v. Gannon*, *R. and M.* 31.

ACTIONS AGAINST EXECUTORS AND ADMINISTRATORS.

In an action against an executor or administrator, the plaintiff must prove that the defendant is executor or administrator, if that fact is denied by plea, and the cause of action as stated.

An action at law cannot be maintained for the distributive share of an intestate's property against the administrator, nor against his executor, although he may have expressly promised to pay. *Jones v. Tanner*, 7 *B. and C.* 542.

Evidence on the plea of ne unques executor.] If the defendant intends to deny his being executor or administrator, he must plead such denial specially, for unless pleaded, his representative character is admitted. The proof of the issue on this plea lies upon the plaintiff, and he may support it by production of the probate, or letters of administration, *see ante, p.* 77, or by secondary evidence of them, after a notice to produce served upon the defendant; in such case, as the presumption of law is, that the probate or letters are in the possession of the party who is alone entitled to them, it does not seem necessary to give any evidence in order to show that they are in the defendant's possession. Some proof of the identity of the defendant, and of the person named as executor in the probate, must be given. The plea of *ne unques executor*, does not deny the cause of action, but only that the defendant is one of the representatives of the testator. 1 *Saund.* 207, *a* (*n*).

Upon the plea of *ne unques executor*, it is sufficient to give evidence of such circumstances as will render the defendant liable as *executor de son tort*. What acts will make a man an *executor de son tort* is a question of law; but it is for the jury to say whether such facts are sufficiently proved. *Padget v. Priest*, 2 *T. R.* 97. Evidence of slight acts of intermeddling with the property of the deceased will be sufficient. In one case, merely taking a Bible, and in another a bedstead, was held sufficient. *Noy*, 69. So living in the house and carrying on the trade of the deceased; *Hooper v. Summersett*, 1 *Wightw.* 16; suing for, receiving, or releasing the debts due to the estate; *Com. Dig. Administrator*, (*C.* 1); entering on a lease or term for years; *Bac. Ab. Executors, B.* 3; pleading any other plea than *ne unques executor*, to an action brought against him as executor, *ibid.*, will be evidence to prove the party an *executor de son tort*. So where A., the servant of B., sold goods of C., an intestate, both before and after C.'s death, in pursuance of orders given by C. in his lifetime, and paid the money arising from such sale into the hands of B., it was held that B. was an executor *de son tort*. *Padget v. Priest*, 2 *T. R.* 97. And where a creditor took an absolute bill of sale of the goods of his debtor, but agreed to leave them in his possession for a limited time, before the expiration of which time the debtor died, and the creditor took and sold the goods, it was held that he had thereby rendered himself *executor de son tort*. *Edwards v. Harben*, 2 *T. R.* 587. Merely locking up the goods of the deceased, directing the funeral in a manner suitable to the estate, and out of the effects of the deceased; feeding his cattle, repairing his houses, or providing necessaries for his children, will not render the party liable as executor *de son tort*, for they are merely offices of kindness and charity. *Toller*, 40. *Bac. Ab. Executors, B.* 3. *Com. Dig. Administrator* (*C.* 2.) In answer to the evidence adduced to prove him executor *de son tort*, the defendant may show that he took possession of the intestate's goods under a fair claim of right; *Fleming v. Jarratt*, 1 *Esp.* 335; *Com. Dig. Administrator*, (*C.* 2); or that he acted under the authority of the rightful administrator; *Hall v. Elliott*, *Peake*, 86; but it is no defence that he acted as the agent of one named executor, but who has never proved the will. *Cottle v. Aldrich*, 1 *Stark.* 37.

In assumpsit against several defendants, as executors, with plea of *ne unques executors*, the plaintiff may have a verdict against the real executors on the counts laying the promises by the testator, and the other defendants must be discharged; *Griffiths v. Franklin*, *M. and M.* 146; and the plaintiff cannot recover on counts upon promises by all the defendants as executors. *Ibid.*

Evidence on plene administravit, proof of assets.] Where the

defendant pleads *plene administravit*, and the plaintiff replies that the defendant had assets, the issue lies upon the plaintiff, who must prove assets existing at the time of the writ sued out. *Mara v. Quin*, 6 *T. R.* 10. If the assets came to the hands of the defendant *after* the writ sued out, the plaintiff should reply that fact specially, and will not be allowed to give it in evidence under the general replication. *Id.* 11. In order to prove assets, the plaintiff may give in evidence the inventory exhibited by the defendant in the ecclesiastical court; but a copy of the inventory, signed by the appraisers, but not by the executors, is not evidence. *B. N. P.* 140. But it is not every inventory that will be proof of assets: thus, the inventory exhibited by an executor before probate, which he makes out without full examination of the property, and in which he is bound to include all the effects of the testator, is not even *primâ facie* evidence of assets. *Stearn v. Mills*, 4 *B. and Ad.* 657, 1 *Nev. and M.* 436, *S. C. ante, p.* 35. Where the defendant has not distinguished the sperate from the desperate debts in the inventory, it has been held that the whole shall, *primâ facie*, be taken to be assets, so as to throw the *onus* of proving some of them desperate upon the defendant. *B. N. P.* 140. *Smith v. Davis, Selw. N. P.* 712. But in another case Lord Ellenborough ruled, that it was necessary to prove, presumptively at least, that these debts have been paid, and that it was the universal practice, upon the plea of *plene administravit*, to prove that effects came into the hands of the defendants. *Giles v. Dyson*, 1 *Stark.* 32. So, where to prove assets, an account rendered by the defendants to the plaintiff was given in evidence, in which they stated that 1000*l*. had been awarded as due to the testator's estate, Lord Ellenborough held that this was not sufficient proof of assets, as it did not show that any part of the sum awarded had been received by the executors. *Williams v. Innes*, 1 *Campb.* 364. If an executor submit to arbitration, such submission, with the award, is not an admission of assets, the arbitrators not directing the *defendant* to pay the money. *Pearson v. Henry*, 5 *T. R.* 6. But a submission to arbitration, and an agreement to pay what shall be awarded, with an award to pay accordingly, is an admission of assets to the amount of the sum so awarded. *Barry v. Rush*, 1 *T. R.* 691. *Worthington v. Barlow*, 7 *T. R.* 453. Proof of an admission by an executor that the debt was just, and that it should be paid as soon as he could, is not evidence to charge him with assets. *Hindsley v. Russell*, 12 *East*, 232. So the payment of interest upon a bond of the testator is not an admission of assets. *Cleverly v. Brett, cited* 5 *T. R.* 8. But a probate stamp has been held to be *primâ facie* evidence that the executor has received assets to the amount covered by the stamp. *Foster v. Blakelock*, 5 *B. and C.* 328.

The authority of this decision has, however, been shaken by

the case of *Stearn v. Mills*, 4 *B. and Ad.* 657, in which Parke, J., said, that he could not concur in that decision, on the ground that the executor was bound to include in the inventory sworn to debts due to the testator, though not recovered.

An administrator *bonâ fide* compounding with a debtor to the estate is not liable to the full amount of the debt compounded, as he is where he releases it without consideration. *Pennington v. Healey*, 1 *Crom. and M.* 402.

Though the plea of *plene administravit*, in an action of assumpsit against an executor, admits a cause of action, yet it does not admit the amount, which must be proved by the plaintiff; but in an action of debt, in which a specific sum is demanded, the specific debt is admitted, and need not be proved, *Shelly's case*, 1 *Salk.* 296, *B. N. P.* 140.

On a plea by several executors that they have fully administered, if some appear to have assets in their hands, and the others not, the latter are entitled to a verdict. *Parsons v. Hancock*, *M. and M.* 330.

Evidence on plene administravit—in answer to proof of assets—payment of debts.] When the plaintiff has given *primâ facie* evidence of assets, the defendant, in answer to such evidence, may prove that those assets have been exhausted by payment of other debts of the deceased, of as high, or of higher degree than the debt of the plaintiff, provided such payments were made before the writ purchased. The course of distribution is as follows: 1, All funeral expenses, and the charges of proving the will, or of taking out letters of administration; and the defendant may show that he has retained money in his hands to pay for the expenses of administration, to which he has made himself liable, without proving that he has paid them. *Gillies v. Smither*, 2 *Stark.* 528. 2, Debts due to the crown by record or specialty. 3, Certain debts created by particular statutes. 4, Debts of record; but unless such debts be docketed according to statute 4 and 5 W. and M. c. 20. they only rank as simple contract debts. *Hickey v. Haytor*, 6 *T. R.* 384. 5, Debts due by specialty, and rent. 6, Debts due by simple contract, first to the king, and secondly to a subject. *Toller*, 258, 278. *Com. Dig. Administration* (*C.* 2.)

If the defendant has paid debts to the amount, after the suing out, but before notice of the plaintiff's writ or debt, he must plead such defence specially, and cannot give it in evidence under *plene administravit*, under which no payments made after the action commenced can be given in evidence. *Dyer*, 32, *a* (*margin*). *Com. Dig. Administration* (*C.* 2). An executor *de son tort* may pay a specialty debt after action brought by a simple contract creditor, and may plead the payment of that debt in bar of the action. *Oxenham v. Clapp*, 2 *B. and Ad.* 309.

In order to prove the existence and payment of the debt set up by the defendant, he may call the creditor, who is a competent witness, to establish both those facts. *B. N. P.* 143. But where the action is brought on a bond of the deceased, and the defendant pleads *plene administravit*, and relies upon the payment of other bonds of the deceased, the execution of such bonds must be proved by calling the attesting witness in the usual manner, even though the bonds have been destroyed. *Gillies v. Smither*, 2 *Stark.* 530. Where, however, the defendant is sued in assumpsit, on a simple contract, and pleads *plene administravit*, and relies upon the payment of bonds of the deceased, it will be sufficient, it is said, to prove the payment; *B. N. P.* 143; for, though no bond, it is yet a good administration.

Evidence on plene administravit, in answer to proof of assets—retainer.] The defendant may either plead a retainer of a debt due to him (which must be a debt of an equal or higher degree than the debt for which the action is brought, in order to entitle the defendant to retain it), or may give it in evidence on the plea of *plene administravit*. 1 *Saund.* 333 (*n*). So the defendant may retain for payments which he has made out of his own monies before the issuing of the writ, in discharge of debts of the deceased of equal or higher degree than the plaintiff's. *Co. Litt.* 283, *a*. *B. N. P.* 141. An executor *de son tort* cannot retain for his own debt, though of higher degree, and though the rightful executor, after action brought, has consented to the retainer. *Curtis v. Palmer*, 3 *T. R.* 587. In answer to such evidence of retainer, the plaintiff may show the will, and who are the rightful executors. *B. N. P.* 143. Where the defendant pleads a retainer, and also a judgment recovered, which, together, cover the assets, it is sufficient for the plaintiff to falsify either claim. *Campion v. Bentley*, 1 *Esp.* 344.

Evidence on plea of outstanding judgments and debts.] The defendant cannot, under the plea of *plene administravit*, give evidence of the existence of outstanding debts of a higher nature. *B. N. P.* 141. Such defence must be pleaded; and where the defendant pleads a judgment obtained against him for 100*l.*, and that he has not goods, except to the value of 5*l.*, and the plaintiff proves that he has 100*l.*, yet he gains nothing, for the substance of the issue is, that the defendant has not above what will satisfy the judgment. *Moon v. Andrews, Hob.* 133; 1 *Saund.* 333 (*n*). Where the defendant pleads an outstanding judgment, the plaintiff may reply that it was obtained or kept on foot by fraud, which the defendant is bound to traverse in his rejoinder; and on this issue the plaintiff may either give in evidence that the debt was not a just one, or

that less is due than the sum for which judgment has been given. 2 *Saund.* 50 (*n*). In answer to the latter evidence, which is *primâ facie* proof of fraud, the defendant may show that the judgment was entered for more than was due by mistake. *Pease v. Naylor*, 5 *T. R.* 80. If a judgment is pleaded, and *per fraudem* replied, upon which issue is taken, and it appears in evidence that the creditor was willing to take less than is recovered, it is proof of fraud; but if it be shown that the administrator had not assets to pay that sum, it is no fraud. *Per Cur. Parker v. Atfield*, 1 *Salk.* 312. If the defendant plead several judgments recovered against himself, to which the plaintiff replies fraud, it will entitle the plaintiff to a general judgment, if he can avoid any one of them; for a judgment recovered against an executor being an admission of assets, if any one of the judgments be falsified, the defendant admits by his plea that he has more assets than will satisfy the other judgments by as much as the judgment, so falsified, amounts to. 1 *Saund.* 337, *a* (*n*). When the judgments, or debts pleaded, are upon *penalties*, it seems the right way of replying is, to say that the creditor would have accepted the less sums, but the defendant either would not pay, or had paid them, *but kept the judgments, or bonds, on foot by fraud and covin*; and the plaintiff, on issue joined thereon, may give in evidence such matter as will serve to avoid the penalties. For if he replies, generally, that the judgments were for less sums, and the defendant has assets above what will satisfy them, on the issue that he has not, the defendant has a right to insist on the *penalties* as the debts. 1 *Saund.* 334 (*n*), *citing Tompson v. Hart*, 3 *Lev.* 368. *Bell v. Bolton*, 1 *Lutw.* 450.

An executor may confess a judgment to a creditor in equal degree with the plaintiff, pending the action, and plead it in bar; and though done for the express purpose of depriving the plaintiff of the debt, it is good both at law and in equity. 2 *Saund.* 51 (*n*). *Tolputt v. Wells*, 1 *Maule and S.* 404. *Pickstock v. Lyster*, 3 *Maule and S.* 375.

Where the defendant pleaded a judgment recovered, and the plaintiff replied that it was obtained and kept on foot by fraud, the judgment creditor was called by the defendant to prove that the debt was a fair one; but Eyre, C. J., rejected his testimony, observing, that by establishing the validity of his own debt, he made good his priority of claim to be paid out of the assets of the intestate, and that this was such an interest as rendered him incompetent. *Campion v. Bentley*, 1 *Esp.* 343.

Evidence in an action suggesting a devastavit.] If an executor, or administrator, in an action brought against him as such, admit assets by his pleading, he will not, in an action of debt on the judgment, suggesting a *devastavit*, be allowed to show that

he has not assets; and it will be sufficient for the plaintiff, upon issue on the plea of *non devastavit*, to prove the former judgment and the return of *nulla bona* to the *fieri facias*. *Erving v. Peters*, 3 *T. R.* 685. *Skelton v. Hawling*, 1 *Wils.* 259. Where the defendant pleads *non est factum testatoris*, or a release to the testator, or payment by him, or *non assumpsit*, these pleas admit assets. 1 *Saund.* 335 (*n*). So a judgment for the plaintiff on demurrer, or by default, will be evidence of assets. *Rock v. Leighton*, 1 *Salk.* 310.

ACTIONS AGAINST HEIRS.

In an action of debt on the bond of the ancestor against the heir (which only lies where the heir is expressly named in the bond; *Co. Litt.* 209, *a*), the usual plea is *riens per descent*. The remedies against heirs for the debts of their ancestors are facilitated by the 1 W. 4, c. 47, which repeals the 3 and 4 W. 3, c. 14. The following are the provisions of the 1 W. 4.

For remedying frauds committed on creditors by wills.] Section 2, reciting, it is not reasonable or just that by the practice or contrivance of any debtors their creditors should be defrauded of their just debts, and nevertheless it hath often so happened, that where several persons having by bonds, covenants, or other specialties, bound themselves and their heirs, and have afterwards died seised in fee simple of and in manors, messuages, lands, tenements, and hereditaments, or had power or authority to dispose of or charge the same by their wills or testaments, have, to the defrauding of such their creditors, by their last wills or testaments, devised the same, or disposed thereof in such manner as such creditors have lost their said debts; for remedying of which, and for the maintenance of just and upright dealing, enacts, that all wills and testamentary limitations, dispositions, or appointments, already made by persons now in being, or hereafter to be made by any person or persons whomsoever, of or concerning any manors, messuages, lands, tenements, or hereditaments, or any rent, profit, term, or charge out of the same, whereof any person or persons, at the time of his, her, or their decease, shall be seised in fee simple, in possession, reversion, or remainder, or have power to dispose of the same by his, her, or their last wills or testaments, shall be deemed or taken, (only as against such person or persons, bodies politic or corporate, and his and their heirs, successors, executors, administrators, and assigns, and every of them, with whom the person or persons making any such wills or testaments, limitations, dispositions, or appointments, shall have entered into any bond, covenant, or other specialty binding his, her, or their heirs,) to be frau-

dulent, and clearly, absolutely, and utterly void, frustrate, and of none effect; any pretence, colour, feigned or presumed consideration, or any other matter or thing to the contrary notwithstanding.

Enabling creditors to recover upon bonds, &c.] Section 3 enacts, that for the means that such creditors may be enabled to recover upon such bonds, covenants, and other specialties, that in the cases before mentioned every such creditor shall and may have and maintain his, her, and their action and actions of debt or covenant upon the said bonds, covenants, and specialties against the heir and heirs at law of such obligor or obligors, covenantor or covenantors, and such devisee and devisees, or the devisee or devisees of such first-mentioned devisee or devisees jointly, by virtue of this act; and such devisee and devisees shall be liable and chargeable for a false plea by him or them pleaded, in the same manner as any heir should have been for any false plea by him pleaded, or for not confessing the lands or tenements to him descended.

If there is no heir at law, actions may be maintained against the devisee.] Section 4 enacts, that if in any case there shall not be any heir at law against whom, jointly with the devisee or devisees, a remedy is hereby given, in every such case every creditor to whom by this act relief is so given shall and may have and maintain his, her, and their action and actions of debt or covenant, as the case may be, against such devisee or devisees solely; and such devisee or devisees shall be liable for false plea as aforesaid.

Not to affect limitations for just debts, or portions for children.] Section 5 provides, that where there hath been or shall be any limitation or appointment, devise or disposition, of or concerning any manors, messuages, lands, tenements, or hereditaments, for the raising or payment of any real and just debt or debts, or any portion or portions, sum or sums of money, for any child or children of any persons according to or in pursuance of any marriage contract or agreement in writing, *bonâ fide* made before such marriage, the same and every of them shall be in full force, and the same manors, messuages, lands, tenements, and hereditaments shall and may be holden and enjoyed by every such person or persons, his, her, and their heirs, executors, administrators, and assigns, for whom the said limitation, appointment, devise, or disposition was made, and by his, her, and their trustee or trustees, his, her, and their heirs, executors, administrators, and assigns, for such estate or interest as shall be so limited or appointed, devised or disposed, until such debt or debts, portion or portions, shall be

raised, paid, and satisfied, any thing in this act contained to the contrary notwithstanding.

Heir at law to be answerable for debts, although he may sell estate before action brought.] Section 6 enacts, that in all cases where any heir at law shall be liable to pay the debts or perform the covenants of his ancestors, in regard of any lands, tenements, or hereditaments descended to him, and shall sell, alien, or make over the same, before any action brought or process sued out against him, such heir at law shall be answerable for such debt or debts, or covenants, in an action or actions of debt or covenant, to the value of the said lands so by him sold, aliened, or made over, in which cases all creditors shall be preferred as in actions against executors and administrators; and such execution shall be taken out upon any judgment or judgments so obtained against such heir, to the value of the said land, as if the same were his own proper debt or debts; saving that the lands, tenements, and hereditaments, *bonâ fide* aliened before the action brought, shall not be liable to such execution.

Where an action of debt is brought against the heir, he may plead riens per descent.] Section 7 provides, that where any action of debt or covenant upon any specialty is brought against the heir, he may plead *riens per descent* at the time of the original writ brought or the bill filed against him, any thing herein contained to the contrary notwithstanding; and the plaintiff in such action may reply that he had lands, tenements, or hereditaments from his ancestor before the original writ brought or bill filed; and if, upon the issue joined thereupon, it be found for the plaintiff, the jury shall inquire of the value of the lands, tenements, or hereditaments so descended, and thereupon judgment shall be given and execution shall be awarded as aforesaid; but if judgment be given against such heir by confession of the action, without confessing the assets descended, or upon demurrer or *nihil dicit*, it shall be for the debt and damage, without any writ to inquire of the lands, tenements, or hereditaments so descended.

Devisees to be liable the same as heirs at law.] Section 8 provides, that all and every the devisee and devisees made liable by this act, shall be liable and chargeable in the same manner as the heir at law by force of this act, notwithstanding the lands, tenements, and hereditaments to him or them devised shall be aliened before the action brought.

Evidence on plea of riens per descent.] Upon issue joined on the plea of *riens per descent*, the execution of the bond being

admitted by the plea, the plaintiff must prove the assets by showing that the ancestor died seised of an estate in fee, and that it descended from him, as the person who was last actually seised, to the defendant as his heir. The seisin of the ancestor may be proved by showing that he was in possession of the lands, or in the receipt of the rents and profits, *ante, p.* 431. His death must then be proved, and that the defendant is his heir. *See ante, p.* 432. Where the lands have descended from the obligor to another who has died seised, and from him to the defendant, the descent must be stated specially, as that the defendant was the heir of A. (who died last seised), who was the heir of the obligor; and so it must be where there have been several intermediate descents; for if the declaration be against the defendant, as heir of the obligor, and it appear in evidence on the plea of *riens per descent,* from the obligor, that the defendant is *heir of the heir* of the obligor, it is a fatal variance. 2 *Saund.* 7, *d* (*n*), *Jenks's case, Cro. Car.* 151. But if the intermediate heirs have not had *actual seisin* of the fee which descended from the obligor, it seems unnecessary to notice them in the declaration. 2 *Saund.* 7, *d* (*n*). *Kellow v. Rowden, Carth.* 126. It is sufficient in the declaration to charge the defendant as *heir* generally, without stating *how* heir, and the plaintiff may show how heir in evidence. *Denham v. Stephenson,* 1 *Salk.* 355.

Evidence on plea of riens per descent—what are assets.] It is a general rule, that though the ancestor *devise* the estate to his heir, yet if he take the same estate in quality and quantity that the law would have given him, the devise is a nullity, and the heir is seised by descent, and the estate assets in his hands. 2 *Saund.* 8, *d* (*n*). *Reading v. Royston,* 1 *Salk.* 242. So where the land is devised charged with the payment of a sum of money; *Clerk v. Smith,* 1 *Salk.* 241; or of debts; *Allam v. Heber,* 2 *Str.* 1270. So a rent in fee, issuing out of the heir's land, and descending to him, though extinct, for it has continuance for this purpose. *Co. Litt.* 374, *b.* So if there be a mortgage *for years,* the reversion in fee in the mortgagor is legal assets, and the plaintiff may have judgment with a *cesset executio;* but where there is a mortgage *in fee,* the equity of redemption is not legal assets. 2 *Saund.* 8, *e* (*n*). *Plunket v. Penson,* 2 *Atk.* 294. So a copyhold in fee is not assets. 4 *Rep.* 22, *a.* By the statute of frauds, 29 Car. 2, c. 3, s. 12, an estate *pur autre vie,* which comes to the heir as special occupant, is made assets by descent. Lands which descend in tail are not assets. 1 *Roll. Ab.* 269 (*B*). A reversion expectant on an estate tail is not assets, upon the general issue of *riens per descent. Mildmay's case,* 6 *Rep.* 42. *a*; *Kellow v. Rowden, Carth.* 129. A reversion after an estate for life is *quasi* assets,

but it ought to be pleaded specially by the heir, and the plaintiff may take judgment of it *quando acciderit*. *Ibid.* *Dyer*, 373, *b*.

If the defendant pleads *riens per descent*, and the jury find that he has something, however small it may be, and insufficient to discharge the debt, the plaintiff is entitled to a general judgment for the debt, damages, and costs, and to sue out the like execution against him as on a judgment for his own debt. 2 *Saund.* 7, *a* (*n*). It is, therefore, unnecessary to prove the value of the assets descended.

Evidence on plea of riens per descent—replication under stat. 1 *W.* 4, *c.* 47, *s.* 7.] At common law, if the heir had *bonâ fide* aliened the lands which he had by descent, before an action was commenced against him, he might discharge himself by pleading that he had nothing by descent *at the time of suing out the writ or filing the bill*, and the obligee had no remedy at law; 2 *Saund.* 7, *e* (*n*); though under this issue he might show that the heir had aliened the lands by covin. *Ibid.* *Dyer*, 149, *a*, *margin*. But this, as we have seen, is altered by the stat. 1 W. 4, c. 47, s. 2, *ante*, *p*. 599.

By section 7, where any action of debt upon any specialty is brought against any heir, he may plead *riens per descent*, at the time of the original writ brought, or the bill filed against him, and the plaintiff may reply *that he had lands, tenements, or hereditaments from his ancestor, before the original writ brought, or bill filed*; and if, upon the issue joined thereupon, it be found for the plaintiff, the jury shall inquire of the value of the lands, &c., so descended, and thereupon judgment shall be given, and execution shall be awarded as aforesaid; but if judgment be given against such heir by confession of the action, without confessing the assets descended, or upon demurrer, or *nil dicit*, it shall be for the debt and damages, without any writ to inquire of the value of the lands, &c., so descended. When issue is joined on this replication; which may, it seems, be pleaded, though the heir has *not* aliened the lands; 2 *Saund.* 8 (*n*); the plaintiff, in addition to the usual proofs under the plea of *riens per descent*, must be prepared with evidence of the *gross* value of the lands descended, for if the jury neglect to find the value, the court will award a *venire de novo*. *Jeffrey v. Barrow*, 10 *Mod.* 18.

Evidence in action against heir and devisee.] At common law, if the ancestor had devised the lands, a bond creditor had no remedy against the devisee. But this is now remedied by the second section of the new statute, which is a re-enactment of the 3 and 4 W. 3, c. 14, s. 2. An action of *covenant* did not lie against a devisee under this act; *Wilson v. Knubley*, 7 *East*, 128; but this is now altered by the new statute, *ante*, *p*. 600,

1 W. 4, c. 47; the act does not extend to any settlement or disposition made by the obligor by *deed* in his lifetime. *Parslowe v. Weedon*, 1 *Eq. Ab.* 149, 2 *Saund.* 8, c (*n*).

ACTIONS AGAINST JUSTICES.

In an action against a justice of the peace, the plaintiff, in addition to his other proofs, must prove the delivery of a notice under 24 Geo. 2, c. 44, and the commencement of the action in proper time.

By 24 Geo. 2, c. 44, s. 1, no writ shall be sued out against, nor any copy of any process at the suit of a subject shall be served on any justice of the peace, for any thing by him done in the execution of his office, until notice in writing of such intended writ or process shall have been delivered to him, or left at the usual place of his abode by the attorney or agent for the party who intends to sue, or cause the same to be sued out or served, at least one calendar month before the suing out or serving the same, in which notice shall be clearly and explicitly contained the cause of action which such party hath or claimeth to have against such justice of the peace; on the back of which notice shall be indorsed the name of such attorney or agent, together with the place of his abode.

By section 5, no evidence shall be permitted to be given by the plaintiff of any cause of action, except such as is contained in the notice thereby directed to be given.

To what cases the statute extends.] It has been frequently observed by the courts, that the notice which is directed to be given to justices and other officers, before actions are brought against them, is of no use to them when they have acted within the strict line of their duty, and was only required for the purpose of protecting them in those cases where they intended to act within it, but by mistake exceeded it. *Per Lord Kenyon, Greenway v. Hurd*, 4 *T. R.* 553. It has uniformly been held, that where a party *bonâ fide* believes or supposes he is acting in pursuance of an act of parliament, he is within the protection of such a clause. *Per Lord Tenterden, Beechey v. Sides*, 9 *B. and C.* 809. Therefore, where a magistrate committed the mother of a bastard child, though *two* magistrates only have jurisdiction in such case, he was held entitled to notice, for he intended to act as a magistrate at the time, however mistakenly. *Wheller v. Toke*, 9 *East*, 364. So where he has authority over the subject matter of the complaint, though the place where the offence is committed is not within his jurisdiction. *Prestridge v. Woodman*, 1 *B. and C.* 12. So where a magistrate committed a driver for being on the shafts of a cart standing still, the act only authorising commitment for

riding on them. *Bird v. Gunston, cited in Cook v. Leonard*, 6 *B. and C.* 354. Where the capacity in which the party acted is equivocal, as where a lord of a manor, being also a justice of peace, seized a gun in the house of an unqualified person, it will be presumed that he acted as a justice. *Briggs v. Evelyn*, 2 *H. Bl.* 114. But where the act in question has not been done in the capacity of a justice, and cannot be referred to that character, but is wholly *diverso intuitu*, notice is not required: thus where a justice of the peace, who was also a mayor of a borough, received a fee for granting a license to a publican, it was held that such fee could could not have been taken by him in his character of a justice, and that he was not within the statute. *Morgan v. Palmer*, 2 *B. and C.* 729. A disturbance took place at C. on the liberation of a prisoner. The defendant, a magistrate, seized the plaintiff because he was going towards the prison, saying, "you are one of the rascals." The plaintiff was no way connected with the disturbance, and the place where he was seized was out of sight of the disturbance. The defendant was held not to be entitled to notice. *James v. Saunders*, 10 *Bingh.* 429; 4 *Moore and S.* 316, *S. C.* So in an action against a person to recover a penalty for acting as a justice of the peace, not being duly qualified, no notice need be proved. *Wright v. Horton, Holt*, 458. The statute extends only to actions of tort, and not to assumpsit. *B. N. P.* 24.

Notice—form of.] The notice must specify the writ or process intended to be sued out, as well as the cause of action. *Lovelace v. Currie*, 7 *T. R.* 631. A notice that an action on the case for false imprisonment and assault would be brought, was held improper. *Strickland v. Ward, ib.* (*n*). It is unnecessary to name all the parties to be included in the action, or to express whether it will be joint or several. *Box v. Jones*, 5 *Price*, 178. So a notice to a magistrate is sufficient to warrant a writ and proceedings against the magistrate and a constable jointly; and where such a notice was given, and the plaintiff, after a month had expired, sued out a writ against the magistrate alone, and afterwards abandoned that writ, and sued out another against the magistrate and constable jointly, the notice was held sufficient. *Jones v. Simpson*, 1 *Crom. and Jer.* 174. It seems that the statute does not require the Christian name of the attorney to be indorsed on the notice; at all events the initials are enough; thus where the indorsement was "T. and W. A. Williams," the names of the attornies being *Thomas Adams Williams* and *William Adams Williams*, it was held sufficient. *James v. Swift*, 4 *B. and C.* 681; *Mayhew v. Locke*, 7 *Taunt.* 63. It has been held that the attorney may describe himself generally of the town in which he resides, as "of Birmingham;" *Osborn v. Gough*, 3 *B. and P.* 551; but in *Crooke v. Currie, Tidd*, 28 (*n*), it was said by Thomson, B., that *London, Manchester*, or other such large

towns, generally, would not be sufficient. A notice written by the attorney, and signed by him thus, "Under my hand at Durham," is insufficient. *Taylor v. Fenwick, cited* 7 *T. R.* 635, and 3 *B. and P.* 551. If the notice describes the attorney as of "New Inn, London," which in fact is in Westminster, it is bad. *Stears v. Smith*, 6 *Esp.* 138. If the attorney's name and place of abode are in the body, instead of the back of the notice, it is sufficient; for the intent of the statute is, that the justice may be able to tender amends to the party or his attorney. *Crooke v. Curry, coram Thomson, B., Tidd*, 27 (*n*). It is sufficient if the notice specify the writ or process, and the cause of action; the *form* of action is not required to be set out. *Sabin v. De Burgh*, 2 *Campb.* 196. It should seem, however, that if it is specified it must agree with the declaration; for where the notice was of an action *on the case* for false imprisonment, &c., and the action brought was *trespass*, the objection was held good. *Strickland v. Ward*, 7 *T. R.* 633 (*n*). *See also* 4 *Bingh.* 511—2. Where the notice stated, that a precept called a *latitat* would be issued against the defendant "for the said imprisonment and sum of money," and the declaration was for assault, battery, and imprisonment, the notice was held good, being sufficient to apprise the magistrate of the nature of the action about to be brought against him, so as to enable him to tender amends; and that the only effect which the omission of any mention of *battery* in the notice could produce, would be to exclude evidence of a battery at the trial. *Robson v. Spearman*, 3 *B. and A.* 493. In stating the cause of action, it is sufficient to inform the defendant substantially of the cause of complaint. *Tidd*, 27. *Jones v. Bird*, 5 *B. and A.* 844. It seems that the cause of action, as stated in the notice, must not vary from that proved, though stated with needless particularity: thus, where the notice described the defendant's warrant as directed to *J. Bark*, and it was in fact directed to "the constable of Halifax," (which J. Bark was not,) it was held insufficient. *Aked v. Stocks*, 4 *Bingh.* 509. But the notice is not vitiated by being in the form of a declaration, and unnecessarily ample, if it express the cause of action with sufficient clearness. *Gimbert v. Coyney, M'Clel. and Y.* 469.

Evidence of notice—delivery.] The plaintiff must prove that the notice was delivered to the justice, or left at the usual place of his abode, at least one calendar month before the suing out or serving of the writ. The month begins with and includes the day on which the notice was served. *Castle v. Burditt*, 3 *T. R.* 623. The notice may be proved by a duplicate original. *See ante, p.* 5, 208.

Evidence of the commencement of the action.] The plaintiff must prove, under the general issue, that the action was com-

menced within six calendar months after the act committed. 24 *Geo.* 2, *c.* 44, *s.* 8, *ante, p.* 581. In case of a continuing imprisonment, a justice is liable to answer for such part of it, suffered under his warrant, as was within six calendar months before the action commenced. *Massey v. Johnson*, 12 *East*, 67. If the imprisonment ends on the 14th of December, it is a sufficient commencement of the action if the writ issues on the 14th of June. *Hardy v. Ryle*, 9 *B. and C.* 603. The plaintiff must show that he proceeded on a writ sued out within six months after the notice, though there be a continuing cause of action; for the notice fixes him to the trespass of which he complains; therefore a second writ issued out of time must be connected by continuance with one within time. *Weston v. Fournier*, 14 *East*, 491. Unless the action appear by the record to be brought in proper time, the plaintiff must produce the writ, or if it be returned, an examined copy of it, *ante, p.* 73. *Johnson v. Smith*, 2 *Burr.* 964. By the uniformity of process act, 2 W. 4, c. 39, s. 12, every writ is to bear date on the day on which the same shall be issued.

Evidence of cause of action.] It must appear, that the cause of action arose in the county in which the action is brought. *See ante, p.* 585, 21 *Jac.* 1, *c.* 12, *s.* 5. Where the defendant committed his servant for insolent disobedience, it was held that the action must be laid in the proper county, because he supposed he had a right to commit as a justice. *Holton v. Bordero, cited per Cur.* 5 *Bingh.* 339. In case of imprisonment under the warrant of a magistrate, in order to connect the magistrate with the act, a notice to produce the warrant should be served upon the defendant, if the warrant be in his possession, so as to enable the plaintiff to give secondary evidence of its contents. But if the warrant remains in the hands of the officer, the latter must be served with *subpœna duces tecum*. The connexion between the justice and the officer may likewise be proved by showing that the former has recognised the acts of the latter.

Evidence of malice in action brought after conviction quashed.] By 43 Geo. 3, c. 141, s. 1, in all actions against any justice of the peace, on account of any conviction made by him under any act of parliament, or for any act done by him for the levying of any penalty, apprehending any party, or for the carrying of any such conviction into effect, in case such conviction shall have been quashed, the plaintiff, besides the value and amount of the penalty levied upon him, (in case any levy shall have been made), shall not be entitled to recover any greater damages than the sum of two-pence, nor any costs of suit, unless it shall be expressly alleged in the declaration in the action, (which action shall be an *action*

upon the case only,) that such acts were done *maliciously, and without any reasonable or probable cause* ; and by section 2, the plaintiff shall not be entitled to recover any penalty which shall have been levied, nor any damages or costs whatsoever, in case such justice shall prove at the trial that such plaintiff was guilty of the offence whereof he had been convicted, or on account of which he had been apprehended, or had otherwise suffered; and that he had undergone no greater punishment than was assigned by law to such offence. The magistrate is protected by the statute only where there is a conviction quashed. But an informal one is enough, as where the warrant of commitment falsely recited an information on oath by T. S., which was in fact laid by T. O. *Massey v. Johnson*, 12 *East*, 67.

In an action against a magistrate for a malicious conviction the question is, not whether there was any actual ground for imputing the crime to the plaintiff, but whether upon the hearing there appeared to be none. The plaintiff must prove a want of probable cause for the conviction, which he can only do by proving what passed upon the hearing before the magistrate, when the conviction took place. The magistrate has nothing to do with the guilt or innocence of the offender, except as they appear from the evidence laid before him. *Per Gibbs, C. J., Burley v. Bethune*, 5 *Taunt.* 584.

Defence.

The defendant may show special matter under the general issue. *See* 21 *Jac.* 1, *c.* 12, *s.* 5, *recited ante, p.* 585.

In what cases justices are protected by evidence of conviction.] The general rule with regard to the effect of a conviction, when offered in evidence as a justification, in an action against a magistrate, has been already stated. *See ante, p.* 135.

Where the subject matter of the conviction is not within the jurisdiction of the justice, the conviction will be no defence in an action brought against him, for it is merely void. Thus where a person was convicted in four several convictions for exercising his ordinary calling on a Sunday, contrary to 29 Car. 2, c. 7, it was held, that as a man could only commit one offence under the statute on the *same* day, the three latter convictions were void; and, it being an excess of jurisdiction, an action lay. *Crepps v. Durden, Cowp.* 640, 16 *East*, 21, 22. So where the defendant had convicted the plaintiff for destroying game, and, though (as it was proved) the plaintiff had effects which might have been distrained, and sufficient to answer the penalty, sent him to Bridewell, it was held that trespass lay. *Hill v. Bateman*, 2 *Str.* 710. So a conviction by two justices, under 17 Geo. 2, c. 38, upon complaint of the

overseers of a parish against the late overseer, for refusing and neglecting to deliver over to them *a certain book* belonging to the parish, called the bastardy ledger, convicting him of the said offence, and adjudging that he should be committed to the common gaol, to be safely kept until he should have yielded up *all and every books* concerning his said office of overseer, belonging to the parish, was held void, as to the adjudication respecting the imprisonment for excess, the same extending beyond what was previously required of the person convicted: and a warrant of commitment founded on this conviction, and directing the gaoler to keep him, in the terms of the adjudication, was also held void *in toto*, for which trespass and false imprisonment would lie against the justices, although the conviction had not been quashed. *Groome v. Forrester*, 5 *Maule and S.* 314. So where a conviction on a statute does not pursue the provisions of it on the face of it; as where an information is to be laid at a special or petty sessions, and this does not appear on it. *Gimbert v. Coyney, M'Cl. and Y.* 469. A warrant of commitment for re-examination for an unreasonable length of time, is wholly void. *Davis v. Capper*, 10 *B. and C.* 28.

It appears to have been doubted, whether the plaintiff, in reply to the conviction relied on by the defendant, may show by extrinsic evidence that the subject matter of the conviction was not within the jurisdiction of the defendant, though it seems quite clear, that if the magistrate have jurisdiction, it cannot be shown that he has come to a wrong conclusion. In *Terry v. Huntington, Hardr.* 480, which was an action of trover brought to recover the value of goods levied under the warrant of the commissioners of excise, it was held, that it appearing, upon special verdict, that they had adjudged low wines to be strong wines, and so had exceeded their jurisdiction, the warrant was void; and, *per Hale, C. J.*, where the jurisdiction itself is stinted and examinable, there their acts are so too, and their judgment is no estoppel if the matter be not within their jurisdiction, which is a particular and circumscribed one. So in the above cited case of *Hill v. Bateman*, 2 *Str.* 710, extrinsic evidence was admitted, to show that the plaintiff had effects which might have been distrained. So it is said by Lord Ellenborough, with regard to *an order* of justices for diverting a highway, that justices cannot make facts by their determination, in order to give to themselves jurisdiction contrary to the truth of the case; *Welch v. Nash*, 8 *East*, 402, 1 *B. and B.* 439; and see the observations of Le Blanc, J., 12 *East*, 67, 82. *Fuller v. Fotch, Carth.* 346. It might, perhaps, be contended, that the conviction of a magistrate cannot be more conclusive upon the facts therein stated, than the sentence of an ecclesiastical court, or the judgment of an inferior court, in both of which cases evidence may be given to

show that the court had no jurisdiction, *ante, pp.* 127, 135. The case of *Strickland v. Ward*, 7 *T. R.* 634 (*n*), has been sometimes referred to as an authority to show that such evidence is not admissible, but it does not appear that the evidence in that case was offered for the purpose of proving a want of jurisdiction. "I gave my opinion," says Mr. J. Yates, "that this conviction could not be controverted in evidence; that the justice, *having a competent jurisdiction of the matter*, his judgment was conclusive till reversed or quashed." In *Gray v. Cookson*, 16 *East*, 23, it seems to have been the opinion of the court, that the plaintiff could not rely upon any matter which did not appear on the face of the conviction, and it appears to be now settled, that if the jurisdiction appears on the face of the conviction, it is conclusive. *Basten v. Carew*, 3 *B. and C.* 649; *Fawcett v. Fowlis*, 7 *B. and C.* 394. Thus where a magistrate convicts under an act giving him jurisdiction in the case of boats; or for having partridges in possession, or keeping a dog without qualification, the plaintiff cannot show that there was no boat, no partridge, or no dog. *Brittain v. Kinnaird*, 1 *B. and B.* 432, 442.

In order to render the conviction a good defence, it must be connected with the commitment, and if it be a conviction for an offence differing from that recited in the commitment, it will furnish no justification: *Rogers v. Jones*, 3 *B. and C.* 409; and *semble* the guilt of plaintiff is not evidence in mitigation. *S. C. R. and M.* 129. In many statutes, as in the 7 and 8 G. 4, c. 30, s. 39, there are clauses enacting that no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same. *See Daniell v. Phillips*, 1 *Crom. M. and R.* 662. If the warrant of commitment does not show an offence over which the justice had jurisdiction, a previous regular conviction will be no defence. *Wickes v. Clutterbuck*, 2 *Bingh.* 483. But where the warrant of commitment recited that the party had been charged on the oath of J. S., but it appeared in evidence that he was charged on the oath of J. O., it was held, that the recital of this false fact might be rejected, and that the warrant and conviction would then stand good. It was added by Le Blanc, J., that the objection would have assumed a very different shape, if there had been no information on oath of any person whereon to found the conviction. *Massey v. Johnson*, 12 *East*, 67, 82. Where a justice, instead of drawing up a regular conviction, ordered the offender into custody till he could settle the matter with the prosecutor, which he accordingly did and was dismissed, it was held that the justice could not justify in an action of trespass. *Bridgett v. Coyney*, 1 *M. and R.* 211.

The acts of a justice who has not duly qualified by taking

the oaths, &c. are not absolutely void, so as to make him a trespasser. *Margate Pier Company v. Hannam, 3 B. and A.* 266. A commitment for a contempt must be by writing. *Mayhew v. Locke,* 2 *Marsh.* 377.

It is not material that the conviction should be drawn up formally at the time when it takes place. It will properly bear date at the time when in fact it took place, and the court will give credit to it, as to a conviction made at that time, when produced in a collateral proceeding, such as an action of trespass; however, they may inquire of the time upon any other occasion, when the conviction is directly impeached. *Per Lord Ellenborough, C. J., Gray v. Cookson,* 16 *East,* 20; *Massey v. Johnson,* 12 *East,* 82, *M'Cl. and Y.* 478.

Where the warrant and conviction state all the circumstances which are essential to give them validity, and are connected by internal reference, no other evidence appears to be necessary than the production of them. *Strickland v. Ward,* 7 *T. R.* 631 (*n*). And it is not competent for the plaintiff to show irregularity in the proceedings, as that no summons issued. *Goss v. Jackson,* 3 *Esp.* 198, *see* 12 *East,* 74 (*n*).

Excused in case of error in judgment.] Where a magistrate acting within his jurisdiction does an act, which under the circumstances is not justifiable, still as he is bound to exercise a judgment on the case, he is not liable for a mere error of judgment. *Mills v. Collett,* 6 *Bingh.* 85.

Tender of amends.] By 24 Geo. 2, c. 44, s. 2, it shall and may be lawful for such justice of the peace, at any time within one calendar month after such notice, to tender amends to the party complaining, or his agent or attorney, and in case the same is not accepted, to plead such tender in bar; and if upon issue joined thereon, the jury shall find the amends so tendered to have been sufficient, then they shall give a verdict for the defendant; and if upon issue so joined, the jury shall find that no amends were tendered, or that the same were not sufficient, and also against the defendant on other pleas, then they shall give a verdict for the plaintiff, and such damages as they shall think proper, &c.

Where the defendant pleaded 40*s*. amends, and the tender was admitted by the replication, and the notice of action was for seizing and carrying away goods to the value of 40*s*. only, it was held that the plaintiff could claim no more than 40*s*., which being covered by the tender, he was nonsuited. *Stringer v. Martyr,* 6 *Esp.* 134.

ACTIONS AGAINST SHERIFFS.

The evidence in actions against sheriffs will be considered under the following heads: 1, For taking the plaintiff's goods in execution. 2, For taking the goods of a tenant in execution without paying the arrears of rent. 3, For not paying over money levied. 4, For not arresting a debtor. 5, For an escape on mesne process. 6, For an escape in execution. 7, For taking insufficient pledges in replevin. 8, For a false return. 9, For extortion.

For taking the Plaintiff's Goods.

In trespass or trover for taking the plaintiff's goods, the plaintiff must prove the property of the goods (if that fact is put in issue by the pleadings) and the taking by the sheriff.

Whether a sheriff who seizes and sells the goods of a trader after an act of bankruptcy, of which he has no notice, is answerable to the assignees in an action of trover, was for some time an unsettled question; the Courts of King's Bench and Common Pleas having held him liable; *Dillon v. Langley*, 2 *B. and Adol.* 131; *Carlisle v. Garland*, 7 *Bingh.* 298; and the Court of Exchequer having, after consideration of those cases, formed a contrary opinion. *Balme v. Hutton*, 2 *Crom. and Jer.* 19. But in the latter case, upon error to the Exchequer Chamber, that court held the sheriff liable, and reversed the judgment of the Court of Exchequer. 9 *Bingh.*471, 2 *C. and J. Garland v. Carlisle*, 10 *Bingh.* 452, 4 *Moore and S.* 24, *S. C. Groves v. Cowham*, 10 *Bingh.* 5, 3 *Moore and S.* 352, *S. C.* And where the sheriff sold goods under a *fi. fa.*, without notice of a previous act of bankruptcy by the defendant, and paid over the proceeds of the sale to the plaintiff upon an indemnity, it was held, by the Court of Common Pleas, that the defendant's assignees might sue the sheriff in an action for money had and received. *Young v. Marshall*, 8 *Bingh.* 43.

If a sheriff after notice of the allowance of a writ of error executes a *fi. fa.*, he is liable in trespass. *Belshaw v. Marshall*, 4 *B. and Ad.* 336. So he is liable in that form of action for an arrest made by one of his officers by colour of a warrant under a *fi. fa.* *Smart v. Hutton*, 2 *Nev. and M.* 426.

Evidence of property.] In general it will be sufficient for the plaintiff to show that he was in possession of the goods at the time of the seizure, which will be *primâ facie* evidence of property, *ante, p.* 226. If, not having been in possession himself, he relies upon an assignment from a former owner,

he must prove the possession of such former owner, and the assignment to himself in the regular manner.

Evidence of the taking.] If the action be in trover, the plaintiff must prove an act amounting to a conversion, or must show a demand and refusal; *ante, p.* 511; if in trespass, he must prove some injury to the goods, or an *asportavit.* The production of a bill of sale executed by the defendant, and reciting the issuing of a writ and the seizure of the goods, will be evidence of a taking in trespass. *Woodward v. Larking,* 3 *Esp.* 286.

Evidence of the taking—connexion between the sheriff and the bailiff.] In order to establish the connexion between the sheriff and his bailiff, and to affect the former with the acts of the latter, the warrant should be proved, though it is not the only medium by which the privity of the sheriff with the act of his bailiff may be established. *Martin v. Bell,* 1 *Stark.* 417. Proof of the warrant issued by the under sheriff, under the sheriff's seal of office, is sufficient without proof of the writ. *Gibbins v. Phillips,* 7 *B. and C.* 535 (*n*). If the warrant remains in the hands of the bailiff, as, if executed, it usually does, for his justification, a *subpœna duces tecum* should be served upon the bailiff. If it has been returned to the sheriff's office, a notice to produce should be given, and secondary evidence will then be admissible; and where the warrant, after the levy, had been returned by the bailiff to the under-sheriff, the sheriff still being in office, it was held that a notice to produce served upon the attorney of the sheriff was sufficient. *Taplin v. Atty,* 3 *Bingh.* 165. It will not be sufficient, in order to establish the connexion between the sheriff and bailiff, to show that the latter is the bound bailiff of the former, and to produce and prove a paper received from the bailiff, purporting to be a copy of the warrant; *Drake v. Sykes,* 7 *T. R.* 113; nor is it sufficient to produce an examined copy of the precept, with the bailiff's name indorsed on it, though the sheriff has returned *cepi corpus. Martin v. Bell,* 1 *Stark.* 413. So where an examined copy of the writ and return with the bailiff's name written on the margin was produced, Lord Ellenborough held it insufficient to connect the sheriff with his acts; *Jones v. Wood,* 3 *Campb.* 228, *Hill v. Sheriff of Middlesex, Holt,* 217, 7 *Taunt.* 8, *S. C., Morgan v. Brydges,* 2 *Stark.* 314; but see *Blatch v. Archer, Cowp.* 63, *Macniel v. Perchard,* 1 *Esp.* 263, *Fermor v. Phillips,* 5 *Moore,* 184, (*n*), 3 *B. and B.* 27 (*n*), *Bowden v. Waithman,* 5 *Moore,* 183; where it was held that the fact of the bailiff's name appearing upon the writ, without further proof, was evidence to go to the jury of the connexion between the sheriff and the bailiff. If the writing of the bailiff's name on the writ be

proved to have been by the authority of the sheriff, it will clearly be sufficient to establish the connexion between them. Thus where, in an action for an escape, the writ produced bore two indorsements, and the witness who produced the writ said that he belonged to the sheriff's office, that the writ came to the sheriff's office from the plaintiff's agent, marked with the bailiff's name, and that he (the witness) again indorsed the bailiff's name on it, the court thought the sheriff's authority sufficiently proved. *Francis v. Neave*, 3 *B. and B.* 26. So where the plaintiff offered in evidence the writ, with the name of the bailiff indorsed upon it, and it was also proved that the writ had been sent to the under-sheriff's office, where the name of the bailiff had been indorsed upon it; and it was proved to be the custom of the office to indorse upon the writ the name of the bailiff who was to execute the process; *Richards, C. B.*, was of opinion that this evidence was sufficient to connect the sheriff with the act of the bailiff. *Tealby v. Gascoigne*, 2 *Stark.* 202. And where it was proved that the course of the sheriff's office was to grant a warrant to the officer whose name was indorsed on the writ, or if not, to strike the name out and insert that of another officer, the indorsement was held to be *primâ facie* sufficient to connect the officer with the sheriff. *Scott v. Marshall*, 2 *Crom. and J.* 238.

So where a paper was produced, on notice, from the sheriff's office, containing an order to the bailiff to give the necessary instructions for making a return to the writ in question, and his answer, Lord Ellenborough held, that it amounted to a clear recognition of the bailiff by the sheriff. *Jones v. Wood*, 3 *Campb.* 229. So where the plaintiff proved that a bail bond, which had been executed and delivered to the bailiff, had been returned to the sheriff, who had made his return of *cepi corpus*, Lord Ellenborough held that this was sufficient to prove the agency of the bailiff. *Martin v. Bell*, 1 *Stark.* 416.

Evidence of the taking—connexion between the sheriff and the bailiff—admissions by the bailiff.] The under-sheriff is the general deputy of the high sheriff, for all purposes; *per Lord Kenyon, Drake v. Sykes*, 7 *T. R.* 116; and therefore his admissions are evidence against the sheriff, without previous proof of his authority in the particular instance, provided they accompanied some official act done, or were made with reference to a matter in which the under-sheriff himself is the party to be charged. *Snowball v. Goodricke*, 4 *B. and Ad.* 541, *S. C.*, 1 *Nev. and M.* 236, *ante, p.* 41. But as the bailiff is not the general officer of the sheriff, it is necessary to show his agency in the particular instance, before an admission by him can be made evidence against the sheriff, and it will then only be evidence in the same manner, and to the same extent, as an admission by any other agent. *See ante, p.* 41, *Bowsher v. Calley*, 1 *Campb.* 391 (*n*).

Defence.

In an action for taking the plaintiff's goods in execution, one of the most usual defences is, that the goods have been fraudulently assigned to the plaintiff, and that they are in fact the goods of the party against whom the writ issued. This defence must now, by the rules of H. 4 W. 4, be specially pleaded, and cannot, either in trespass or trover, be given in evidence under the general issue.

If the plaintiff has never been in possession of the goods, but claims them by an assignment, under which possession has never been given, it will, as it seems, be sufficient for the defendant to plead no property in the plaintiff, and to show under that plea that the assignment is fraudulent and void, and it will not be necessary for him in such case to go further and plead the judgment and writ under which the goods were taken; *but see Martyn v. Podger*, 5 *Burr.* 2633; but if the plaintiff was in possession of the goods at the time of the taking, the defendant must plead and prove the writ and judgment, for otherwise he would appear to be a mere wrong-doer, and the plaintiff being in possession, would have a sufficient title as against him. *Lake v. Billers*, 1 *Ld. Raym.* 733, *see Martyn v. Podger*, 5 *Burr.* 2631. So if the goods were in fact the goods of the plaintiff, but the defendant justifies the taking of them under a *fi. fa.* against him, such defence cannot be given in evidence under the general issue, either in trespass or in trover, but must be pleaded specially.

Evidence of fraudulent assignment.] In general the continuing possession of the vendor or assignor is evidence of fraud. *Twyne's case*, 3 *Rep.* 80 (*b*). Where a debtor executed a bill of sale of his goods to his creditor on the 27th of March, and possession was given by the delivery of a corkscrew, but all the effects continued in the possession of the debtor till the 7th April, when he died, it was held that the bill of sale was fraudulent. *Edwards v. Harben*, 2 *T. R.* 587, *see* 1 *B. and B.* 512, 1 *Taunt.* 382. So where an assignment to a creditor was made, and a servant of the assignee was immediately put into the house, but the assignor continued to carry on the business, as usual, for several weeks after, Lord Ellenborough held that a concurrent possession with the assignor was colourable, and that there must be an *exclusive* possession under the assignment, or it is fraudulent and void as against creditors. *Wordall v. Smith*, 1 *Campb.* 332, *but see Benton v. Thornhill*, 7 *Taunt.* 149, *Latimer v. Batson*, 4 *B. and C.* 653, *Eastwood v. Brown*, *R. and M.* 313, *post*. But the want of transfer of possession does not in itself make the assignment void; it is only evidence of fraud. *Martindale v. Booth*, 3 *B. and Ad.* 498.

The circumstance of an assignor, who is under pecuniary

embarrassments, remaining in possession of the property assigned, is always suspicious; but if it does not appear from other facts of the case that this takes place under a fraudulent arrangement between the parties, for the purpose of delaying creditors, it is not of itself a *conclusive* badge of fraud. *Eastwood v. Brown, R. and M.* 312. The not taking possession is in some measure indicative of fraud, but is not conclusive; to make it absolutely void there must be something that shows the deed fraudulent in the concoction of it. *Per Ld. Ellenborough, Hoffman v. Pitt,* 5 *Esp.* 25.

Where A. lends B. money to buy goods, and at the same time takes a bill of sale of them for securing the money, this transaction is valid. *B. N. P.* 258, 2 *B. and P.* 60, *Steel v. Brown,* 1 *Taunt.* 381. So where the goods of A. being taken in execution, and put up to sale, B. became the purchaser, and took a bill of sale of the sheriff, but permitted A. to continue in possession, it was held that this transaction was valid. *Kidd v. Rawlinson,* 2 *B. and P.* 59. So where the husband of the plaintiff's mother absconded, and his effects were publicly sold by auction, and the plaintiff purchased them in order to accommodate his mother, and removed some, but left the greater part in her possession, it was held that there was a *bonâ fide* change of property. *Leonard v. Baker,* 1 *Maule and S.* 251, *and see Jezeph v. Ingram,* 1 *B. Moore,* 189. So where a creditor having taken the goods of his debtor in execution, afterwards bought them at a public auction by the sheriff, and paid for them, and took a bill of sale, and let them to the former owner at a rent, which was actually paid, the sale was held to be valid. *Watkins v. Birch,* 4 *Taunt.* 823. And when goods were seized and sold by the landlord, under a distress for rent, and purchased by a trustee of the tenant's estate, for the benefit of the creditors, and were permitted by the trustee to remain in the possession of the tenant, it was held that they were not liable to be taken in execution by a creditor of the tenant. *Guthrie v. Wood,* 1 *Stark.* 367. So where the goods of A. were seized under a *fi. fa.*, and the judgment creditor took a bill of sale from the sheriff, and afterwards sold the goods to B. who put a man into possession, but the goods remained in A.'s house and were used by him as before the execution, it was held (the circumstance of the execution being notorious in the neighbourhood) that the sale was good. *Latimer v. Batson,* 4 *B. and C.* 652. Again, where a debtor, previous to an execution, sold, for the full value, the whole of his lease, furniture, and household effects, to a creditor, and out of the purchase money paid several of the other creditors, but continued in the occupation of the house and furniture after the assignment, the sale was held to be valid. *Eastwood v. Brown, R. and M.* 312. So where a farmer gave a bill of sale of all his stock to secure a debt, and the agent of the creditor took pos-

session, and resided on the farm while he converted the stock, but the debtor also continued to reside on the farm, and exercised acts of ownership, and appeared as master, the agent of the creditor giving orders in his name, the jury having found the transaction good, the court refused to disturb the verdict. *Benton v. Thornhill*, 7 *Taunt.* 149.

An assignment of a part of a debtor's effects, for the benefit of certain creditors, not made with the intention of fraudulently delaying his other creditors, is good. *Estwick v. Caillaud*, 5 *T. R.* 420. So where A. was indebted to B. and also to C., and being sued to execution by B., voluntarily gave a warrant of attorney to C., on which judgment was entered, and execution levied, on the day on which B. would have been entitled to execution, it was held that this preference was legal. *Holbird v. Anderson*, 5 *T. R.* 235; *Meux v. Howell*, 4 *East*, 1. So also where a debtor, being sued, and insolvent, pending the suit, and before execution, assigned all his effects to trustees for the benefit of all his creditors, under which assignment possession was immediately taken, it was held that this assignment was not fraudulent, though made with intent to delay the plaintiff of his execution. *Pickstock v. Lyster*, 3 *Maule and S.* 371. *See the observations of Richards, B.*, 3 *Price*, 16. *Bowen v. Bramidge*, 6 *C. and P.* 140. As to such an assignment being an act of bankruptcy, *vide ante, p.* 547.

In order to prove the fraud, declarations made by the assignor, at the time of executing the bill of sale, are admissible, as part of the *res gestæ*, but not if made at another time. *Phillips v. Eamer*, 2 *Esp.* 357; *Penn v. Scholey*, 5 *Esp.* 243.

Where A. sued out a writ of *fi. fa.* against the goods of B., and the sheriff executed a bill of sale of certain goods to A., after which, B. remaining in possession of the goods, the sheriff again took them under another execution against B., in an action of trover by A. against the sheriff for taking these goods, it was held that the declarations of B. at the time of the second execution were evidence for the defendant, to show that A.'s execution was colourable. *Willies v. Farley*, 3 *C. and P.* 395.

Competency of Witness.

In trespass for taking the plaintiff's goods, where the question was, whether the goods had been assigned to the plaintiff by A., against whom the execution issued, it was held that A. was not a competent witness for the defendant to disprove the assignment; for the object of calling A. being to prove that the execution, which had been levied upon the goods to satisfy a debt owing by him, was valid, he was called to give evidence, the effect of which would be to pay his own debt with the plaintiff's goods. *Bland v. Ansley*, 2 *N. R.* 331.

For taking the Goods of a Tenant in execution without paying the year's rent.

The plaintiff in this action must prove, 1, the demise and the rent arrear; 2, the levy and removal of the goods; 3, notice to the sheriff; 4, the value of the goods seized.

By 8 Anne, c. 14, s. 1, no goods or chattels lying or being in or upon any messuage, lands, or tenements, leased for life or lives, term of years, at will, or otherwise, shall be liable to be taken by virtue of any execution, on any pretence whatsoever, unless the party, at whose suit the said execution is sued out, shall, before the removal of such goods from off the said premises, by virtue of such execution or extent, pay to the landlord of the premises, or his bailiff, all such sum or sums of money as are due for rent for the said premises, at the time of the taking of such goods and chattels, by virtue of such execution, provided the arrears of rent do not amount to more than one year's rent. *See* 2 *B. and Ad.* 421.

By 11 Geo. 4, cap. 11, the provisions of the statute of Anne are extended to a seizure and sale of goods under the bishop's extract, upon a *pone per vadios*, issuing out of the Court of Pleas at Durham. *See Brandling v. Barrington*, 6 *B. and C.* 467.

A commission of bankrupt is not an execution within the meaning of this statute. *Ex parte Devisne, Co. B. L.*190. *Eden*, 304, 15 *East*, 230. Where the sheriff seizes, after an act of bankruptcy committed by the tenant, he cannot retain a year's rent for the landlord against the assignees; *Lee v. Lopes*, 15 *East*, 230; but in an action against the sheriff, who has levied under an execution after an act of bankruptcy committed, it is no defence that the tenant has become bankrupt, and that the sheriff is liable to the assignees. *Duck v. Braddyl, M'Cl.* 217.

The trustee of an outstanding satisfied term, in trust to attend the inheritance, is a *landlord* within the statute. *Colyer v. Speer*, 2 *B. and B.* 67. So the action may be brought by an executor or administrator. *Palgrave v. Windham*, 1 *Str.* 212. On a sale of premises it was stipulated that from the time of the vendee taking possession until the completion of the purchase, he should pay to the vendor at the rate of 100*l. per annum*; held that this was *rent*, and that the sheriff was bound to pay the amount thereof under the statute of Anne. *Saunders v. Musgrave*, 6 *B. and C.* 524.

The plaintiff can only recover the rent due at the time of the taking the goods, and not that which accrues after the taking and during the continuance of the sheriff in possession. *Hoskins v. Knight*, 1 *Maule and S.* 245.

Evidence of the demise.] The declaration need not state the

particulars of the demise; but if stated, they must be proved as laid. *Bristow v. Wright, Dougl.* 640. In order to prove the rent in arrear, it will be sufficient to show the occupation by the tenant, and the amount of the rent, and it is not necessary to call the tenant, in order to prove the state of accounts between the landlord and himself. *Harrison v. Barry,* 7 *Price,* 690. A demise from a lessee to an under-tenant is within the statute 11 Geo. 2, c. 19. *Thurgood v. Richardson,* 7 *Bingh.* 428.

Evidence of the levy.] The plaintiff may prove the execution by production of the writ and warrant, which will connect the bailiff and sheriff, *see ante, p.* 614, and by proof of the levy having been made. It will be sufficient for the plaintiff to prove, that *some* of the goods have been removed. *Colyer v. Speer,* 2 *B. and B.* 67.

Evidence of notice.] In order to render the sheriff liable as a wrong doer, by the removal of the goods, it must be proved, that he had notice of the landlord's claim. *See Arnitt v. Garnett,* 3 *B. and A.* 441; *Smith v. Russell,* 3 *Taunt.* 400. No specific notice is required by the statute, and if a knowledge of the landlord's claim can be by any means brought home to the defendant, before he has parted with the money raised by the levy, he will be liable. Thus, if it appears that the sale has been conducted with great secrecy and dispatch, it is for the jury to say, whether the sheriff knew of the fact, that the rent was in arrear, though no notice of it had been given to him before the sale. *Andrews v. Dixon,* 3 *B. and A.* 645.

Defence.

If the agent of the landlord take from the sheriff's officer an undertaking to pay the year's rent, and consent to the goods being sold, the landlord cannot afterwards maintain an action on the statute, though the rent be not paid pursuant to the undertaking, and though the undertaking be void by the statute of frauds. *Rotherey v. Wood,* 3 *Camph.* 24.

It is no defence that the landlord has released his tenant in order to make him a competent witness. *Thurgood v. Richardson,* 7 *Bingh.* 428.

For not paying over Money levied.

In an action for money had and received against a sheriff, for not paying over to the plaintiff money levied under an execution in an action at the suit of the plaintiff, the latter must prove the writ of execution, and levy under it.

The writ of execution must be produced; or if it has been returned and filed, an examined copy of it must be given in evidence, or if it be in the hands of the sheriff, a notice to

produce must be served, and secondary evidence may then be given. *See post, p.* 621. It seems to be doubtful whether this action can be maintained before the return of the writ; *see dictum per Parke, J. Morland v. Pellatt,* 8 *B. and C.* 727. The plaintiff must connect the sheriff with the bailiff by proving the warrant, or giving evidence of some act of recognition. *Vide suprap.* 614. If the defendant has returned the writ, and has levied the sum, an examined copy of the writ and return will be sufficient. *Dale v. Birch,* 3 *Camph.* 347. It is not sufficient to prove the taking and selling of the goods by a person reputed to be an officer of the sheriff, without proof of the writ of execution or warrant. *Wilson v. Norman,* 1 *Esp.* 154. The defendant may deduct his poundage. *Longdill v. Jones,* 1 *Stark.* 346.

For not arresting a Debtor.

In an action against a sheriff for not arresting a debtor when he had an opportunity, the plaintiff must prove, if those facts are traversed by the pleadings, 1, the debt due from the debtor to himself; 2, the issuing of the process and delivery to the defendant; and 3, that the defendant had notice, so that he might have arrested the debtor.

Evidence of debt.] Whatever evidence would be sufficient to charge the debtor in an action brought against him by the plaintiff, will be sufficient, as against the sheriff in this action. *Sloman v. Herne,* 2 *Esp.* 695; *Gibbon v. Coggon,* 2 *Campb.* 188; *and see post, Actions for Escape.*

Evidence of issuing process.] In order to prove the process issued, the plaintiff should produce the writ; or if returned, should give in evidence an examined copy of the writ and return. If it be in the possession of the defendant, a notice to produce should be served. To prove that the writ remains in the possession of the defendant, after the return, search should be made at the treasury, and upon its appearing not to have been returned, it will be presumed, on proof of delivery to the under-sheriff, that it remains in the defendant's possession, *ante, p.* 9.

Evidence of notice.] If a person against whom the sheriff has a writ does not abscond, but continues in the daily exercise of his usual occupation, appears publicly as usual, and is visible to every person that comes to him on business, and the bailiff neglects to arrest him, and returns *non est inventus,* it is a false return. *Beckford v. Montague,* 2 *Esp.* 475. It is not, however, sufficient merely to prove, that the debtor was within the defendant's bailiwick; the plaintiff must go further, and prove notice to the under-sheriff in the country, or

to the bailiff to whom the warrant was directed; a notice to the town agent of the under-sheriff is not sufficient. *Gibbon v. Coggan*, 2 *Campb.* 189.

A bound-bailiff is not a competent witness for the defendant to prove that he endeavoured to make the arrest. *Powell v. Hord*, 2 *Ld. Raym.* 1411.

It is no defence that the debtor was arrested the day after the return of the writ, though it may govern the damages. *Barker v. Green*, 2 *Bingh.* 317.

For Escape on Mesne Process.

In an action against the sheriff for an escape on mesne process, the plaintiff must prove (if those facts be denied on the pleadings) 1, the debt due from the party arrested; 2, the issuing and delivery of the process to the defendant; 3, the arrest; and 4, the escape.

Evidence of the debt due from the party arrested.] The plaintiff must prove a debt due to him from the party arrested, *Alexander v. Macauley*, 4 *T. R.* 611, at the time of the arrest. *White v. Jones*, 5 *Esp.* 160. If the declaration state, that the party was indebted to the plaintiff *for goods sold and delivered*, it must be so proved, *Parker v. Fenn*, 2 *Esp.* 477 (*n*), but the exact sum mentioned in the declaration need not be proved. *B. N. P.* 66. The debt is proved by the same evidence which would have been requisite to establish it in an action against the debtor himself, and therefore an admission of the debt by the debtor at any time before the escape is good evidence against the sheriff. *Williams v. Bridges*, 3 *Stark.* 42, *Rogers v. Jones*, 7 *B. and C.* 89.

Evidence of the issuing and delivery of the process to the defendant.] The issuing of the process, and the delivery of it to the under-sheriff, must be proved. If the process has been returned, an examined copy of the writ and return will be evidence of these facts. *B. N. P.* 66. If not returned, after proof of a notice to produce, and that search has been made at the treasury, secondary evidence will be admitted. Where it was averred that the debtor was arrested "under a writ indorsed for bail by virtue of an affidavit now on record," it was held necessary to prove the affidavit. *Webb v. Herne*, 1 *B. and P.* 382. But where the declaration stated that the writ was marked for bail "by virtue of an affidavit of the cause of action of the plaintiff in that behalf, before then made, and duly filed of record *in this court*, according to the form of the statute, &c." without stating by whom the affidavit was made, it was held that the averment was sufficiently proved by an office copy of the affidavit. *Casburn v. Reid*, 2 *B. Moore*, 60. A variance between the process stated and that proved will

be fatal; but where it was alleged that the prisoner was arrested on mesne process, and brought before a judge at chambers, by virtue of a writ of *habeas corpus*, and was by him thereupon committed to the custody of the marshal, "as by the record thereof now remaining in the court of King's Bench appears, &c." it was held that such allegation was either impertinent and surplusage, since, properly speaking, such documents are not records, or considering them as *quasi* of record, the allegation was sufficiently proved by the production of them from the office of the clerk of the papers. *Wigley v. Jones*, 5 *East*, 440; *and see Bevan v. Jones*, 4 *B. and C.* 403; *Bromfield v. Jones*, 4 *B. and C.* 380, *ante, p.* 65.

Evidence of the arrest.] The facts sufficient to constitute an arrest have already been noticed, *ante, p.* 585; *and see post, p.* 623. Where the plaintiff gave in evidence the sheriff's return of *cepi corpus* to the writ, and proved that the defendant in the former action did not put in bail above, and was not in the sheriff's custody at the return of the writ, Lord Ellenborough held, that the arrest and escape were sufficiently proved by the sheriff's return, and the non-appearance of the party, according to the exigency of the writ. *Fairlie v. Birch*, 3 *Campb.* 397. Where the writ has not been returned, evidence must be given to connect the bailiff and the sheriff. *See ante, p.* 614.

Evidence of the escape.] That the debtor was seen abroad *after* the return of the writ, and that bail has not been put in, will be evidence of an escape, *vide supra.* An admission of the escape by the under-sheriff, is evidence against the sheriff, *ante, p.* 614. The party escaping may be called to prove a voluntary escape, *P. N. P.* 67, for though the whole debt may be recovered against the sheriff, yet in an action against the original debtor for the debt, he can neither plead in bar, nor give in evidence in reduction of damages, the judgment obtained in the action against the sheriff. *Per Abbott, C. J. Hunter v. King*, 4 *B. and A.* 210.

Damages.] The plaintiff is only entitled to recover such damages as he can show he has sustained. If he has lost the whole debt, the jury must give him damages to that extent, together with what he has lost in costs; if he can still recover his debt, the damages must be diminished accordingly. *Scott v. Henley*, 1 *Moo. and Rob.*, 227; *see Morris v. Robinson*, 3 *B. and C.* 206.

Defence.

By the rules of H. 4 W 4, in actions on the case for an escape, the plea of not guilty shall only operate as a denial of

the neglect or default of the sheriff or his officers; but not of the debt, judgment, or preliminary proceedings.

It is a good defence, that the defendant, though he has taken no bail-bond, has put in bail before the expiration of the rule to bring in the body. *Pariente v. Plumtree*, 2 *B. and P.* 35.

For Escape in Execution.

In an action against the sheriff, for suffering a prisoner in execution to escape, the plaintiff must prove, 1, (if those facts be denied on the pleadings) the judgment; 2, the issuing, and delivery to the defendant of the writ of *ca. sa.*; 3, the arrest; and 4, the escape.

The mode of proving the judgment, *ante, p.* 70, and the issuing and delivery of the writ, *ante, p.* 621, has already been mentioned.

Evidence of arrest.] In order to render the sheriff liable, the officer must be the *authority* to arrest, but he need not be the hand that arrests; nor in the presence of the person arrested; nor actually in sight; nor is any exact distance prescribed. It would be a different case, if he be upon some other errand, or stay at home and send a third person to make the arrest. *Per Ld. Mansfield, Blatch v. Archer, Cowp.* 65. In that case, the son of the officer said, at the time of the arrest, that he had his authority in his pocket, the officer himself being at the distance of thirty rods, and not in sight, and it was held a good arrest; *and see supra.* If A. be in custody at the suit of B., and a writ be delivered to the sheriff at the suit of D., the delivery of the writ is an arrest in law, and if A. escape, D. may bring debt against the sheriff for an escape. *B. N. P.* 66.

It must appear that the prisoner was in the custody of the *defendant*; and, therefore, where he was taken in execution by a former sheriff, the assignment of the prisoner from him to the defendant by indenture ought to be proved, *Davidson v. Seymour, M. and M.* 34, unless the defendant has become sheriff on the death of his predecessor; in which case he is bound, at his peril, to take notice of all the executions which are against any persons whom he finds in the gaols. *Westley's case*, 3 *Rep.* 72, *b*, *B. N. P.* 68.

In an action against the marshal for an escape, the declaration alleged a submission by the plaintiff and A. B. to arbitration, the award, the attachment, and the escape; it was held that the submission must be proved, though it would perhaps have been otherwise if the plaintiff had only alleged the making of the rule of court for the issuing of the attachment. *Brazier v. Jones*, 8 *B. and C.* 124.

Evidence of the escape.] Wherever the prisoner in execution is in a different custody from that which is likely to

enforce payment of the debt, it is an escape. *Per Buller J.*, *Benton v. Sutton*, 1 *B. and P.* 27. Thus if a sheriff's officer having taken a prisoner in execution, permit him to go in company with one of his followers to his own house for the purpose of settling his affairs, it is an escape. *Ibid.* If the defendant, when taken in execution, is seen at large for ever so short a time, either before or after the return of the writ, it is an escape. *Per de Grey, C. J. Hawkins v. Plomer*, 2 *W. Bl.* 1049. If the bailiff of a liberty, who has the return and execution of writs, removes a prisoner, taken in execution, to the county gaol, situate out of the liberty, and there delivers him into the custody of the sheriff, it is an escape, for which the bailiff is liable. *Boothman v. Earl of Surrey*, 2 *T. R.* 5. Where the officer, having taken a party in execution, permitted him to go to a lock-up house, kept by another officer, not named in the warrant, where he remained fourteen days, *before the return of the writ*, it was held no escape. *Houlditch v. Birch*, 4 *Taunt.* 608. Under a count for a voluntary escape, the plaintiff may give evidence of a negligent escape. *Bonafous v. Walker*, 2 *T. R.* 126. If the sheriff receive the sum indorsed on the writ from the prisoner, and before payment over to the plaintiff, liberate him, it is an escape. *Slackford v. Austin*, 14 *East*, 468, 4 *B. and C.* 31.

By stat. 8 and 9 W. 3, c. 27, s. 8, if the marshal of the King's Bench, or warden of the Fleet, or their respective deputy or deputies, or other keeper or keepers of any other prison or prisons, shall, after one day's notice in writing given for that purpose, refuse to show any prisoner, committed in execution, to the creditor at whose suit such prisoner was committed or charged, or to his attorney, every such refusal shall be adjudged an escape in law. And by section 9, if any person or persons, desiring to charge any person with any action or execution, shall desire to be informed by the said marshal or warden, or their respective deputy or deputies, or by any other keeper of any other prison, whether such person be a prisoner in his custody or not, the said marshal or warden, or such other keeper of any other prison shall give a true note in writing thereof, to the person so requesting the same, or to his lawful attorney, upon demand at his office for that purpose, or in default thereof shall forfeit the sum of 50*l.*; and if such marshal, &c., shall give a note in writing that such person is an actual prisoner in his or their custody, every such note shall be accepted and taken as a sufficient evidence that such person was at that time a prisoner in actual custody.

Defence.

By statute 8 and 9 W. 3, c. 27, s. 6, no retaking on fresh pursuit shall be given in evidence, on the trial of any issue in

an action of escape, unless the same be specially pleaded; nor shall any special plea be allowed without an oath by the defendant, that the prisoner escaped without his consent, privity, or knowledge. Where the defendant pleaded that the prisoner returned into his custody, and that he did thereupon, then, and afterwards, keep and detain the said prisoner in his custody, &c., and the plaintiff traversed that after the prisoner's return, the defendant did keep and detain him in custody, &c. in manner and form as stated in the plea, it was held that the plea was negatived by evidence that after the prisoner's return he again escaped, and died out of custody. *Chambers v. Jones*, 11 *East*, 406. If the defendant plead *no escape*, he cannot give in evidence no arrest, for he admits an arrest by his plea. *B. N. P.* 67.

If the prison take fire, or be broken open by the king's enemies, by means whereof the prisoners escape, this will excuse the sheriff; but it is otherwise if the prison be broken open by the king's subjects. *B. N. P.* 66. So he may show, that the escape was by the fraud and covin of the party really interested in the judgment. *Hiscocks v. Jones, Esq., M. and M.* 269.

The defendant may show that the judgment against the prisoner was void, but not that it was erroneous; thus he may show that the judgment was given in an inferior court, in debt on a bond made *extra jurisdictionem*, for such a judgment is void. *B. N. P.* 65, 66. *Watson on Sheriffs*, 54. So if the writ of execution be absolutely *void*, the sheriff will not be liable for an escape, but it is otherwise when it is only erroneous. *Weaver v. Clifford, Cro. Jac.* 3. *Burton v. Eyre, id.* 288. *B. N. P.* 66.

The defendant may show that he discharged the prisoner by virtue of an order of the insolvent court, and the order itself is sufficient evidence, 7 Geo. 4, c. 57, s. 81, and by the same section he may give the special matter in evidence under the general issue. *Saffrey v. Jones*, 2 *B. and Ad.* 598.

For taking insufficient Pledges in replevin.

In an action on the case against a sheriff, for taking insufficient pledges in replevin, the plaintiff must prove, (if those facts are denied on the pleadings,) 1, the taking of the distress; 2, the replevying of the distress by the sheriff, and the proceedings in the replevin; 3, the taking of the bond; 4, the insufficiency of the sureties.

Evidence of the replevying.] The replevying of the distress may be proved by the original precept to deliver. If it be in the hands of the bailiff, he should be served with a *subpœna duces tecum*; if it be returned to the sheriff, a notice to produce should be given to let in secondary evidence. The connexion between the sheriff and the bailiff delivering may also be proved by showing that the sheriff has recognised the bailiff's act,

Evidence of the taking of the bond.] Notice to produce the bond should be given to the defendant. Where it was produced under such notice, and it also appeared, that upon inquiry made on behalf of the plaintiff, whether any replevin bond had been executed, the original bond had been shown to the plaintiff's agent, and a copy of it delivered to him, Abbott, C. J., was of opinion that, under these circumstances, it was unnecessary to call the subscribing witness, and that as against the sheriff it must be taken to be a valid bond. *Scott v. Waithman*, 3 *Stark*. 168. So where it was proved that the sheriff had assigned the bond to the plaintiff, Abbott, C. J., was of opinion that it was not necessary for the plaintiff to prove the execution by the sureties, for that as against the sheriff, proof of the assignment by him to the plaintiff was sufficient. *Barnes v. Lucas*, *R. and M.* 264.

Evidence of the insufficiency of the sureties.] Some evidence must be given by the plaintiff of the insufficiency of the sureties; but it is said that very slight evidence is enough to throw the proof on the sheriff, for the sureties are known to him, and he is to take care they are sufficient. *Saunders v. Darling*, *B. N. P.* 60. Where the sureties had recently been bankrupt, but were in apparent credit when the bond was taken, it was held that the sheriff was not liable. *Hindle v. Blades*, 5 *Taunt*. 225. If a person, known to the sheriff, make inquiries as to the credit or reputation of a tradesman, and the value of his stock, and communicate the result of such inquiry to the sheriff, if it be favourable, the latter need not make a personal inquiry. *Per Dallas, C. J., Sutton v. Waite*, 8 *B. Moore*, 28. Though the sheriff is justified in taking a person as a surety, who appears to the world to be a person of responsibility, yet if he actually know that the party is not responsible, or if, having the means in his power of informing himself upon the subject, he neglect to use them, then, notwithstanding appearances, he is responsible in the event of the surety being really insufficient. *Per Abbott, C. J., Scott v. Waithman*, 3 *Stark*. 170. In order to prove the insufficiency, evidence may be given that applications had been made to the surety for money by different creditors, at different times, which he was unable to pay, and that he had repeatedly broken his promises to pay. *Gwyllim v. Scholey*, 6 *Esp*. 100. The sureties in the bond may be witnesses to prove whether they were sufficient or not. 1 *Saund*. 195, *g (n)*. *Hindle v. Blades*, 5 *Taunt*. 225.

The sheriff is only liable to the extent to which the sureties themselves are liable, viz. double the value of the goods distrained. *Evans v. Brander*, 2 *H. Bl.* 547. *Baker v. Garratt*, 3 *Bingh*. 59.

In replevin for a distress damage feasant, the sheriff is not

bound to take more than one surety. *Hucker v. Gordon*, 1 *Crom. and M.* 58, 3 *Tyr.* 107, *S. C.*

For a False Return.

In an action against a sheriff for a false return, the plaintiff must prove, (if those facts are denied on the pleadings,) 1, the cause of action, or judgment as stated in the declaration, 2, the writ and the return; 3, the falsehood of the return.

The mode of proving the cause of action, *ante, p.* 621; the judgment, *ante, p.* 70; and the writ and return, *ante, p.* 621, has been already stated.

Evidence to disprove the return.] The plaintiff must prove the falsehood of the return. Thus in an action for a false return of *non est inventus*, he may show that the party against whom the writ issued was publicly following his usual avocations. *Beckford v. Montague*, 2 *Esp.* 475, *ante, p.* 620. So in an action for a false return of *nulla bona* to a *fi. fa.* he must show that the party had goods within the bailiwick, of which the sheriff had notice, or might, by using due diligence, have had notice. In an action for a false return of *nulla bona* to a *fi. fa.* against the goods of A. and B., the plaintiff must have a verdict if he prove that A. only had goods. *Jones v. Clayton*, 4 *Maule and S.* 349. The declarations of the sheriff's officer respecting goods seized by him under a *fi. fa*, and in his possession at the time, are evidence against the sheriff, though made after the return day of the writ. *Jacobs v. Humphrey*, 2 *Crom. and M.* 413, 4 *Tyr.* 272, *S. C.*

Defence.

In an action for a false return of *nulla bona* to a writ of *fi. fa.*, the defendant may show that the party against whom the writ issued has become bankrupt, and that a commission has issued against him, in which case the bankruptcy must be regularly proved. *B. N. P.* 41; *and see Dowden v. Fowle*, 4 *Campb.* 38, *supra.* So the defendant may show that he paid the money levied to the landlord, under 8 Anne, c. 14, for arrears of rent: but in such case some evidence, though slight, must be given of the rent being due, and the landlord cannot be called for this purpose; for, if the plaintiff succeed, the witness would be liable to an action at the suit of the sheriff, in which this judgment would be evidence of special damage. *Keightley v. Birch*, 3 *Campb.* 521. Where the sheriff returned *nulla bona* after satisfying the landlord's claim for rent, and the king's taxes, and the plaintiff assented to his quitting possession of the premises, and sued out a *ca. sa.*, it was held that he could not afterwards maintain an action for a false return to the *fi. fa.*, however unfounded the claim for rent might turn out to be. *Stuart v. Whittaker*, *R. and M.* 310. So where to

a *fi. fa.* for 301*l.* the sheriff returned that he had levied only 13*l.*, which the plaintiff accepted, Abbott, C. J., held, that by such acceptance the plaintiff had waived all further claim against the sheriff. *Benyon v. Garratt,* 1 *C. and P.* 154.

The defendant may show that the judgment on which the writ issued was fraudulent and void, *ante, p.* 625. *Penn v. Scholey,* 5 *Esp.* 243; *and see Tyler v. Duke of Leeds,* 2 *Stark.* 221.

Where the defence is, that the goods in question have been assigned before the execution, the plaintiff, in reply, may show the assignment fraudulent. *Dewey v. Bayntun,* 6 *East,* 257. Where the sheriff relied upon a previous judgment and execution, under which he had levied, Abbott, C. J., was of opinion that, in an action for a false return against him (he not being indemnified), it was not competent to the plaintiff to show that the other judgment and execution were fraudulent and void; but, upon its being suggested that Lord Kenyon had permitted such evidence to be given, *Kempland v. Macauley, Peake,* 65, he received the evidence, with liberty to the defendant to move to enter a nonsuit in case a verdict should be found for the plaintiff. *Wormall v. Young.* 5 *B. and C.* 661.

The defendant cannot give in evidence, even in mitigation of damages, an inquisition held by him to inquire into the property of the goods. *Glossop v. Pole,* 3 *Maule and S.* 175.

A person who has forcibly taken the goods out of the hands of the sheriff is competent to prove his own property in them, for the sheriff cannot maintain an action against him for the rescue, after a return of *nulla bona.* *Thomas v. Pearse,* 5 *Price,* 547. And the assistant to a sheriff's officer, who has been left in possession under an execution, is a competent witness for the sheriff, for the judgment would not be evidence either for or against the witness. *Clark v. Lucas,* 1 *C. and P.* 156, *R. and M.* 32.

For Extortion.

In an action against the sheriff for extortion, the plaintiff must prove, (if those facts be denied on the pleadings,) 1, the judgment, if stated; 2, the *fi. fa.*, or other writ; 3, the connexion between the sheriff and the bailiff; and, 4, the extortion.

In debt on 28 Eliz. c. 4, for extortion in executing a *fi. fa.*, if the plaintiff state the judgment in his declaration, and that execution was sued out on the *said* judgment, it must be proved. *Savage v. Smith,* 2 *W. Bl.* 1101, 5 *T. R.* 498. Where the statute 28 Eliz. c. 4, was recited as 29 Eliz., it was held a fatal variance. *Rumsey v. Taffnell,* 2 *Bingh.* 255.

The mode in which the issuing of the *fi. fa., ante, p.* 621, and the connexion between the sheriff and the bailiff, *ante, p.* 613, may be proved, has been already stated. If the sheriff

has returned to the writ, that he has caused to be levied, &c., it will be evidence that he has adopted the act of the bailiff as his own. *Woodgate v. Knatchbull*, 2 *T. R.* 154. It must appear that the sheriff intrusted the bailiff with his authority in the particular case in which the latter has abused it, and therefore, if the extortion be committed by an officer not named in the warrant, to whose house the party had been carried, the sheriff is not liable. *George v. Perring*, 4 *Esp.* 63. So where a writ is directed to the coroner, though it is executed by an officer of the sheriff, the latter is not liable. *Sargeant v. Cowan*, 1 *Crom. and M.* 491, 3 *Tyr.* 538, *S. C.*

Where the money levied is not sufficient to satisfy the plaintiff's claim, the retaining of any part which ought to be paid over to the plaintiff, is an indirect receiving or taking from him within the statute 28 Eliz. c. 4. *Buckle v. Bewes*, 3 *B. and C.* 688.

In an action against a sheriff's officer, on 32 Geo. 2, c. 28, it has been ruled that the plaintiff must prove a table of fees allowed by the justices. *Jaques v. Whitcombe*, 1 *Esp.* 361. *Martin v. Slade*, 2 *Bos. and Pul. N. R.* 59. *Martin v. Bell*, 1 *Stark.* 417. But in *Martin v. Bell*, 6 *Maule and S.* 220, it was held by the court of King's Bench, that this table does not apply to the sheriff's fee for an arrest, but that what is allowed by the master on taxation is what he is by law allowed to take.

ACTIONS AGAINST HUNDREDORS, &c.

The statutes of Winton, the Riot act, the Black act, and other statutes relating to remedies against the hundred, have been repealed by 7 and 8 Geo. 4, c. 27, and their provisions have been partially restored, with considerable amendments, by 7 and 8 Geo. 4, c. 31. This last statute took effect on the 1st of July, 1827. The following are the only clauses of it that are applicable to the purpose of the present work.

By section 2, it is enacted, that if any *church or chapel*, or any chapel for the religious worship of persons dissenting from the united church of England and Ireland, duly registered or recorded, or *any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, or granary, or any building or erection used in carrying on any trade or manufacture, or branch thereof, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture, or in any branch thereof, or any steam-engine or other engine, for sinking, draining, or working any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or trunk for conveying*

minerals from any mine, shall be feloniously demolished, pulled down, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together, in every such case the inhabitants of the hundred, wapentake, ward, or other district in the nature of a hundred, by whatever name it shall be denominated, in which any of the said offences shall be committed, shall be liable to yield full compensation to the person or persons damnified by the offence, not only for the damage so done to any of the subjects hereinbefore enumerated, but also for any damage which may at the same time be done by any such offenders to any fixture, furniture, or goods whatever, in any such church, chapel, house, or other of the buildings or erections aforesaid.

Section 3. Provided always, and be it enacted, that no action or summary proceeding, as hereinafter mentioned, shall be maintainable by virtue of this act, for the damage caused by any of the said offences, unless the person or persons damnified, or such of them as shall have knowledge of the circumstances of the offence, or the servant or servants who had the care of the property damaged, shall within seven days after the commission of the offence, go before some justice of the peace residing near and having jurisdiction over the place where the offence shall have been committed, and shall state upon oath before such justice the names of the offenders, if known, and shall submit to the examination of such justice touching the circumstances of the offence, and become bound by recognizance before him to prosecute the offenders when apprehended: provided also, that no person shall be enabled to bring any such action, unless he shall commence the same within three calendar months after the commission of the offence.

By section 4, it is enacted, that no process for appearance in any action to be brought by virtue of this act against any hundred or other like district shall be served on any inhabitant thereof, except on the high constable, or some one of the two constables (if there be more than one), who shall, within seven days after such service, give notice thereof to two justices of the peace of the county, riding, or division in which such hundred or district shall be situate, residing in or acting for the hundred or district; and such high constable is hereby empowered to cause to be entered an appearance in the said action, and also to defend the same, on behalf of the inhabitants of the hundred or district, as he shall be advised; or, instead of defending the same, it shall be lawful for him, with the consent and approbation of such justices, to suffer judgment to go by default; and the person upon whom, as high constable, the process in the action shall be served, shall, notwithstanding the expiration of his office, continue to act for all the purposes of this act, until the termination of all pro-

ceedings in and consequent upon such action; but if such person shall die before such termination, the succeeding high constable shall act in his stead.

By section 5, it is enacted, that in any action to be brought by virtue of this act against the inhabitants of any hundred or other like district, or against the inhabitants of any county of a city or town, or of any such liberty, franchise, city, town, or place, as is hereinafter mentioned, no inhabitant thereof shall, by reason of any interest arising from such inhabitancy, be exempted or precluded from giving evidence either for the plaintiff or for the defendants.

By section 8, reciting that it is expedient to provide a summary mode of proceeding where the damage is of small amount; it is enacted, that it shall not be lawful for any person to commence any action against the inhabitants of any hundred or other like district, where the damage alleged to have been sustained by reason of any of the offences in this act mentioned shall not exceed the sum of thirty pounds.

By section 10, it is enacted, that if any high constable shall refuse or neglect to exhibit or give such notice as is required in any of the cases aforesaid, it shall be lawful for the party damnified to sue him for the amount of the damage sustained, such amount to be recovered by an action on the case, together with full costs of suit.

By section 11, it is enacted, that every action or summary claim to recover compensation for the damage caused to any church or chapel by any of the offences in this act mentioned, shall be brought in the name of the rector, vicar, or curate of such church or chapel, or in case there be no rector, vicar, or curate, then in the names of the church or chapel wardens, if there be any such, and if not, in the name or names of any one or more of the persons in whom the property of such chapel may be vested; and the amount recovered in any such case shall be applied in the rebuilding or repairing such church or chapel; and where any of the offences in this act mentioned shall be committed on any property belonging to a body corporate, such body may recover compensation against the hundred or other like district, in the same manner, and subject to the same conditions, as any person damnified is by this act enabled to do; provided always, that the several conditions which are hereinbefore required to be performed by or on behalf of any person damnified, may, in the case of a body corporate, be performed by any officer of such body on behalf thereof.

By section 12, reciting that the offences for which compensation is granted by virtue of this act may be committed in counties of cities and towns, or in such liberties, franchises, cities, towns, and places, as either do not contribute at all to the payment of any county rate, or contribute thereto, but not as being part of any hundred or other like district; and it is expedient

to provide for all such cases; it is enacted, that where any of the offences in this act mentioned shall be committed in a county of a city or town, or in any such liberty, franchise, city, town, or place, the inhabitants thereof shall be liable to yield compensation in the same manner, and under the same conditions and restrictions in all respects, as the inhabitants of the hundred; and every thing in this act in any way relating to a hundred, or to the inhabitants thereof, shall equally apply to every county of a city or town, and to every such liberty, franchise, city, town, and place, and to the inhabitants thereof; and where the justices of the peace of the county, riding, or division, are excluded from holding jurisdiction in any such liberty, franchise, city, town, or place, in every such case all the powers, authorities, and duties by this act given to or imposed on such justices, shall be exercised and performed by the justices of the peace of the liberty, franchise, city, town, or place in which the offence shall be committed; and where the offence shall be committed in a county of a city or town, all the like powers, authorities, and duties shall be exercised and performed by the justices of the peace of such county of a city or town; and in every action to be brought or summary claim to be preferred under this act against the inhabitants of a county of a city or town, or of any such liberty, franchise, city, town, or place, the process for appearance in the action, and the notice required in the case of the claim, shall be served upon some one peace officer of such county, liberty, franchise, city, town, or place; and all matters which by this act the high constable of a hundred is authorised or required to do in either of such cases, shall be done by the peace officer so served, who shall have the same powers, rights, and remedies, as such high constable has by virtue of this act, and shall be subject to the same liabilities; and shall, notwithstanding the expiration of his office, continue to act for all the purposes of this act, until the termination of all proceedings in and consequent upon such action or claim; but if he shall die before such termination, his successor shall act in his stead."

From the above extract it will appear, that the remedy given by the statute of Winton against the hundred, in the case of robbery, and by the Black act, in the case of certain malicious injuries to property, unaccompanied by riot, is abolished.

The remedy against the hundred is extended to the destruction of threshing machines by the statute 2 and 3 W. 4, c. 72, by the first section of which it is enacted, that where any threshing machine, whether fixed or moveable, or any part thereof, shall be feloniously cut, broken, damaged, or destroyed by any persons riotously and tumultuously assembled together, then and in every such case the inhabitants of the hundred, wapentake, ward, or other district, in the nature of a hundred, or by whatever name it shall be denominated, in which any such offence shall be committed, shall be liable to

yield the full compensation to the person or persons damnified by the offence, not only for the damage done to any such machines as aforesaid, but also for any damage which may at the same time be done by any such offenders to any erection or fixture whatever, in or about or belonging to any such machines. By section 2, the provisions of the 7 and 8 G. 4, c. 31, are extended to threshing machines.

On the issue *Not guilty*, the plaintiff must be prepared to prove, 1, his interest in the property injured; 2, the offence; 3, that it was committed within the hundred, &c.; 4, the examination of himself or servant, agreeably to the statute; 5, the recognizance to prosecute; 6, the amount of damage; 7, the commencement of the action within three calendar months.

The cases cited hereafter, are all decisions on the old statutes, but are applicable to the recent act.

Interest of the plaintiff.] The bare trustee of a satisfied term is entitled to sue for damages. *Pritchett v. Waldron*, 5 *T. R.* 14.—(Riot act.) Parties jointly interested in the property may join in the action. *Winterstoke Hundred's case*, *Dy.* 370, *a.*—(Stat. Winton.) Where the property injured consists of a church or chapel, or belongs to a corporation, the 11th section of the act points out the parties who are to sue. A reversioner may sue for the damage sustained by him, *Pellew v. Inhab. of Wonford*, 9 *B. and C.* 134; though the hundred may thereby be subjected to several actions. *S. C.* 142.—(Black act.) One of two lessees may sue for his share of interest. *Lowe v. Broxtowe*, 3 *B. and Ad.* 558.

The offence.] By 7 and 8 G. 4, c. 30, s. 8, it is enacted, that if any persons riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force demolish, pull down, or destroy, or begin to pull down, demolish, or destroy any church or chapel, or any chapel for the religious worship of persons dissenting from the united church of England and Ireland, duly registered or recorded; or any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malt-house, hop-oast, barn, or granary, or any building or erection used in carrying on any trade or manufacture, or any branch thereof; or any machinery, whether fixed or moveable, prepared for or employed in any manufacture, or any branch thereof; or any steam-engine or other engine for sinking, draining, or working any mine; or any staith, building, or erection used in conducting the business of any mine; or any bridge, waggon-way, or trunk for conveying minerals from any mine; every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon.

As this section corresponds almost verbally with the section of 7 and 8 Geo. 4, c. 31, which gives the action against the hundred, it is presumed that, in order to entitle the party to that remedy, the offence must be a felony within the above clause. *See Reid v. Clarke*, 7 *T. R.* 496 (Riot act). • The 38th section of 57 Geo. 3, c. 19, which extended the remedy to all cases of injury to buildings by rioters, is repealed by 7 and 8 Geo. 4, c. 27; so that where the injury is partial it will be matter of inquiry (as formerly under the riot act) whether the acts of the rioters constitute a "beginning to demolish" within the above clause. The following cases were decided on the riot act.

Where a riotous mob broke the windows, sashes, and shutters of a house, in order to compel the occupier to illuminate, this was held not within the act. *Reid v. Clarke, supra.* It is a question for the jury, whether the rioters intended to stop short of demolition, or to proceed to further acts to effect their purpose. *Burrows v. Wright*, 1 *East*, 615. During the riots respecting the corn bill, the mob attacked the plaintiff's house, and proceeded to break his windows, shutters, fanlight over his door, &c., when the military appeared and dispersed them: held sufficient evidence of a beginning to demolish. *Sampson v. Chambers*, 4 *Campb.* 221. On the same occasion, where the mob voluntarily retired after doing similar mischief to the plaintiff's house, the jury, under the direction of Lord Ellenborough, found for the defendants. *Lord King v. Chambers, ib.* 377. A mob attacked the plaintiff's house, with intent to liberate a comrade in custody there, and did many acts of violence to the property: *per* Lord Ellenborough—"The question is, what was the purpose of the mob, and whether, if they could not have rescued their leader, they would not have proceeded to demolish the house, as they threatened, unless his escape had intervened. It is a principle of law, that a person intends to do that which is the natural effect of what he does. If, therefore, the pulling down the house was intended as a means of getting at him, they intended to demolish the house." *Beckwith v. Wood*, 2 *Stark.* 263. *See also Holt's N. P. C.* 203. "The beginning to pull down," said Parke, J., in a case where the prisoners were so charged, "means not simply a demolition of a part, but of a part with intent to demolish the whole. If the prisoners meant to stop where they did, (i. e. breaking windows and doors) and do no more, they are not guilty; but if they intended, when they broke the windows, &c., to go farther, and destroy the house, they are guilty of a capital offence. If they had the full means of going further, and were not interrupted, but left off of their own accord, it is evidence that they meant the work of demolition to stop where it did." It was proved that the parties began by breaking the windows, and having afterwards entered

the house, set fire to the furniture; but no part of the house was burnt. Parke, J., said to the jury, "If you think the prisoners originally came without intent to demolish, and that the setting fire to the premises was an after thought, but with that intent, then you must acquit, because no part of the house having been burnt, there was no beginning to destroy. If they came originally without such intent, but afterwards set fire to the house, the offence is arson. If you have doubts whether they originally came with an intent to demolish, you may use the setting fire to the furniture under such circumstances, and in such a manner as that the necessary consequence, if not for timely interference, would have been the burning of the house, as evidence to show that they had such intent, although they began to demolish in another manner." *R. v. Ashton, Lewin, C. C.* 296. The same rule was laid down in the two following cases:—The prisoners about midnight came to the house of the prosecutor, and having in a riotous manner burst open the door, broke some of the furniture, and all the windows, and did other damage, after which they went away, though there was nothing to prevent their committing further injury. Littledale J., told the jury that this was not a "beginning to demolish," unless they should be satisfied that the ultimate object of the rioters was to demolish the house; and that if they had carried their intentions into full effect, they would in fact have demolished it. That such was not the case here, for that they had gone away, having manifestly completed their purpose, and done all the injury they meant to do. *R. v. Thomas*, 4 *C. and P.* 237, *and see* 6 *C. and P.* 333. Where an election mob pursued a person who took refuge in a house, upon which they attacked the house, shouting, "pull it down," and broke the door and windows, and destroyed much of the furniture, but being unable to find the person they were in search of, went away; Tindal, C. J., ruled, that the case was not within the statute, the object of the rioters not being to destroy the house, but to secure the person they were in search of. *Price's case*, 5 *C. and P.* 510. But the case may fall within the statute, though the intent to demolish may be accompanied with another intent, which may have influenced the conduct of the rioters. Thus where a party of coal-whippers having a feeling of ill-will towards a coal-lumper, who paid less than the usual wages, collected a mob, and went to the house where he kept his pay-table, exclaiming, that they would murder him, and began to throw stones, &c., and broke the windows and partitions, and part of a wall, and after his escape, continued to throw stones, &c., till stopped by the police; Gurney, B., ruled, that the parties might be convicted under the 7 and 8 G. 4, c. 30, s. 8, of beginning to demolish, though their principal object might be to injure the lumper, provided it was also their object to

demolish the house, on account of its having been used by him. *R. v. Batt*, 6 *C. and P.* 329.

On the 57 Geo. 3, c. 19, where the words are "house, shop, or other buildings whatever," the court of King's Bench held that hustings, erected to take the poll at elections, were not within the description. *Allen v. Ayre*, 3 *D. and R.* 96.

Committed within the hundred, &c.] The offence must be proved to have been committed within the hundred or other district or place named in the declaration, and which must be one of the different classes of places enumerated in the 2d or 12th section. Where a distinct hundred is called the "half hundred" or "upper hundred" of A., and the action is brought against the "hundred of A.," the plaintiff must be nonsuited, 2 *Saund.* (*Williams's*) 375, *b. n* (3), *citing Constable's case, Hob.* 246 (stat. Winton). But if the half hundred of A. be in fact only part of hundred A., the defendant must plead in abatement. *Ibid.*

Examination of party, &c.] See s. 3, of stat. *supra.* The seven days ought, it seems, to be reckoned exclusively of the day on which the offence was committed. *Pellew v. Inh. Wonford*, 9 *B. and C.* 134 (Black act). The words of the Black act, 9 Geo. 1, c. 22, differ slightly from those of the above statute, and are as follow: "No person or persons shall be enabled to recover, &c. unless he or they shall within four days, &c. give in his, her, or their examination upon oath, or the examination upon oath of his, her, or their servant or servants that had the care of his or their houses, &c." On this clause it has been decided, that where the premises injured are under the care of several servants, they should *all* be examined. *Duke of Somerset v. Hundred of Mere*, 4 *B. and C.* 167. Where a tenant quitted the premises during the hay harvest, and the steward of the *lessor*, living at a distance, directed certain persons to get in the hay, who took possession of the farm for this purpose, and carried on their work under the superintendance of an under-steward, it was held that these latter, and not the steward, were the persons to be examined, *S. C. ibid.* The servant who has the *general* care of the property is the proper person to be examined, although other servants may have the special care of particular parts of it. *Lowe v. Broxtowe*, 3 *B. and Ad.* 550. Where the reversioner sued, his own oath was held sufficient, without examining the tenant or his servants. *Pellew v. Hundred of Wonford, supra.* It is unnecessary to examine both servants *and* owner; if the latter is in residence, or is only casually absent for a short time, his oath is enough; but where he has no superintendance, and has left the house in the charge of servants, the

latter are the proper persons to be examined. *Rolfe v. Hund. Elthorne, M. and M.* 185. On the similar clause of 52 Geo. 3, c. 130, s. 4, it was ruled that, where the premises demolished belonged to several partners, all who were present at the transaction ought to have been examined; or the affidavit of the one examined should at least negative that the rest had any knowledge of the offenders, *Nesham v. Armstrong*, 1 *B. and A.* 146. It may be inferred from this case, and from the dictum of Holroyd, J., in *Duke of Somerset v. Hund. Mere*, that the examination of *all* the owners, or *all* the servants, was not necessary under the former statutes, where the persons omitted were shown to be ignorant of the subject matter of inquiry. If so, the introduction of the words in the recent statute, "or such of them as shall have knowledge of the circumstances of the offence," makes no material difference in its construction.

In the stat. 27 Eliz. c. 13, (Hue and Cry,) the examination is to be before a "justice of the peace of the county inhabiting within the hundred, or near unto the same." Under this, it has been decided, that though the examining justice lived several miles off, and there were many others living nearer, it was sufficient; the act being only directory in that respect. *Lake v. Hund. Croydon, B. N. P.* 186. It was also held no objection that the examination took place out of the jurisdiction by a justice, who was usually commorant with his family within the jurisdiction. *Helier v. Hundred Benhurst, Cro. Car.* 211. It must be observed, however, that the words of the recent act are not exactly similar to those of the statute of Eliz.

Under the Black act it was held that the plaintiff was not bound in his examination to state his *suspicion* respecting the offender. *Pellew v. Hundred Wonford, supra.* It is unnecessary for the justice of the peace to take the examination in writing; it is sufficient for him to appear at the trial, and depose the substance of the affidavit. *Graham v. Hundred Becontree, B. N. P.* 186 (stat. 27 Eliz.) But if the affidavit be in writing, no other evidence of the examination shall be admitted. *Ibid.* Proof that the person who took the examination was acting as a justice of the peace, is sufficient, and the affidavit may be read on proof that it was delivered to the person producing it by the justice's clerk, without proving his hand-writing. *Per Parker, C. J. Ibid.*

Amount of damage.] The statute entitles the plaintiff to recover compensation for damage done at the same time by the rioters to any fixture, furniture, or goods whatever, in the buildings or erections therein named, s. 3. Neither the Riot nor the Black act contained any express provision of this kind. Yet where the injury done to personal property was the imme-

diate effect of the act of demolition, or if the destruction of furniture, &c. and demolition of the building were parts of the same riotous transaction, and done at the same time, the plaintiff was allowed to include the whole in his damages. *Hyde v. Cogan, Dougl.* 699 (Riot act). So where in pulling down a house damage was done to the garden appurtenant. *Wilmot v. Horton, ibid.* 701 (*n*). So where the rioters broke into a flour-seller's house, and damaged the flour in the course of demolishing the house. *Greasley v. Higginbottom,* 1 *East*, 636. But where a distinct and substantive offence was committed by some of the mob, as where the flour (in the last case) was stolen, or compulsorily parted with by the dealer at an under price; or where money, plate, &c. were missing after the riot, *Smith v. Bolton, Holt, N. P.* 201; or where the mob broke into a gun-maker's, and carried away the arms for their own use, *Beckwith v. Wood,* 1 *B. and A.* 487; in these cases the hundred was held not liable. And such, it is apprehended, still continues to be the law, notwithstanding the words of additional liability inserted in the present act.

Where the damage, alleged to have been sustained, does not exceed 30*l.* no action lies, *see s.* 8.

Commencement of the action.] Where the commencement of the action does not appear by the record to have been within three calendar months, the plaintiff must produce a copy of the writ. 2 *Saund.* 375, *a. n.* (3). In *Norris v. Hundred Gawtry, Hob.* 139 (stat. Winton), the day of committing the offence was included in the computation. But this seems at variance with the later case of *Pellew v. Wonford,* 9 *B. and C.* 134.

Competency of witnesses.] Inhabitants of the hundred, district, &c. are not exempted or precluded from giving evidence on either side (sect. 5).

APPENDIX.—No. I.

Bill of Exceptions.

SEPARATE from the record, as to the effect of evidence, in K. B. (Tidd's Forms, 373, *5th edit.)*

—— to wit. Be it remembered, that in the term of ——, in the —— year of the reign of our sovereign lord *George* the Third, now king of the united kingdom of *Great Britain* and *Ireland*, &c. came *A. B.* by —— his attorney, into the court of our said lord the king before the king himself at *Westminster*, and impleaded *C. D.* in a certain plea of trespass on the case upon promises; on which the said *A. B.* declared against him that, &c. (*set out the declaration and other pleadings, and proceed as follows:*) And thereupon issue was joined between the said *A. B.* and the said *C. D.* And afterwards, to wit, at the sittings of *nisi prius*, holden at the *Guildhall* of the city of *London* aforesaid, in and for the said city, on —— the —— day of —— in the —— year of the reign of our said lord the king, before the right honourable *Edward* Lord *Ellenborough*, chief-justice of our said lord the king, assigned to hold pleas in the court of our said lord the king before the king himself, *Edward Law*, Esquire, being associated unto the said chief-justice, according to the form of the statute in such case made and provided, the aforesaid issue so joined between the said parties as aforesaid, came on to be tried by a jury of the city of *London* aforesaid, for that purpose duly impanelled, that is to say, *E. F.* of —— and *G. H.* of ——, &c. (*names and additions of jury*), good and lawful men of the said city of *London:* at which day, came there as well the said *A. B.* as the said *C. D.* by their respective attornies aforesaid; and the jurors of the jury aforesaid, impanelled to try the said issue, being called, also came, and were then and there in due manner chosen and sworn to try the same issue; and upon the trial of that issue, the counsel learned in the law for the said *A. B.* to maintain and prove the said issue on his part, gave in evidence that, &c. (*here set out the evidence on the part of the plaintiff, and afterwards that on the part of the defendant, and then proceed as follows:*) Whereupon the said counsel for the said *C. D.* did then and there insist before the said chief-justice, on the behalf of the said *C. D.* that the said several matters so produced and given in evidence on the part of the said

C. D. as aforesaid, were sufficient, and ought to be admitted and allowed as decisive evidence, to entitle the said *C. D.* to a verdict, and to bar the said *A. B.* of his action aforesaid; and the said counsel for the said *C. D.* did then and there pray the said chief-justice, to admit and allow the said matters so produced and given in evidence for the said *C. D.* to be conclusive evidence in favour of the said *C. D.* to entitle him to a verdict in this cause, and to bar the said *A. B.* of his action aforesaid: But to this the counsel learned in the law of the said *A. B.* did then and there insist, before the said chief-justice, that the same were not sufficient, nor ought to be admitted or allowed to entitle the said *C. D.* to a verdict, or to bar the said *A. B.* of his action aforesaid; and the said chief-justice did then and there declare, and deliver his opinion to the jury aforesaid, that the said several matters so produced and given in evidence on the part of the said *C. D.* were not sufficient to bar the said *A. B.* of his action aforesaid, and with that direction left the same to the said jury; and the jury aforesaid then and there gave their verdict for the said *A. B.* and ——*l.* damages; whereupon the said counsel for the said *C. D.* did then and there, on the behalf of the said *C. D.* except to the aforesaid opinion of the said chief-justice, and insisted on the said several matters, as an absolute bar to the said action: And inasmuch as the said several matters so produced and given in evidence on the part of the said *C. D.* and by his counsel aforesaid objected and insisted on as a bar to the action aforesaid, do not appear by the record of the verdict aforesaid, the said counsel for the said *C. D.* did then and there propose their aforesaid exception to the opinion of the said chief-justice, and requested him to put his seal to this bill of exceptions, containing the said several matters so produced and given in evidence on the part of the said *C. D.* as aforesaid, according to the form of the statute in such case made and provided: And thereupon the said chief-justice, at the request of the said counsel for the said *C. D.* did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, on the said —— day of ——, in the —— year of the reign of his present majesty.

Bill of exceptions to be tacked to the record, as to a witness's being bound to answer a question tending to disgrace him, in K. B. (Tidd's Forms, 375.)

(After the end of the issue, and award of the venire facias, proceed as follows:)

Which said issue, in form aforesaid joined between the said parties, afterwards, to wit, at the sittings of *nisi prius*, holden at *Westminster Hall*, in and for the county of *Middlesex*,

on —— the —— day of ——, in the —— year of the reign of our lord the now king, before the right honourable *Edward* Lord *Ellenborough*, chief-justice of our said lord the king, assigned to hold pleas in the court of our said lord the king before the king himself, *Edward Law*, Esquire, being associated unto the said chief-justice, according to the form of the statute in such case made and provided, came on to be tried by a jury of the said county of *Middlesex*, for that purpose duly impanelled. At which day came there as well the said *A. B.* as the said *C. D.* by their respective attornies aforesaid; and the jurors of the jury aforesaid, impanelled to try the said issue, being called, also came, and were then and there in due manner chosen and sworn to try the said issue: And upon the trial of that issue, one *E. F.* was produced and examined upon oath as a witness, by the counsel learned in the law for the said *A. B.* in support of the said action; and upon the cross-examination of the said *E. F.* by the counsel learned in the law for the said *C. D.* the said *E. F.* was asked by the said last-mentioned counsel, whether he had not been imprisoned, upon a conviction for forging a coal-meter's ticket: Whereupon the said chief-justice then and there interposed, and before the said *E. F.* had given any answer to the said question, declared and delivered his opinion, that the said *E. F.* was not bound to answer the said question; and the said *E. F.* thereupon then and there refused to answer the same: And afterwards, at the said trial, the said chief-justice, in summing up the evidence given in the said cause to the jury aforesaid, did further declare and deliver his opinion to the said jury, that the said *E. F.*'s refusal to answer the said question, threw no manner of discredit upon him the said *E. F.*; and the jury aforesaid thereupon then and there gave their verdict for the said *A. B.* and ——*l.* damages: Whereupon the said counsel for the said *C. D.* did then and there on behalf of the said *C. D.* except to the aforesaid opinion of the said chief-justice, and insisted that the said *E. F.* was bound to answer the said question, and that his refusal to answer the same was, and ought to be considered by the said jury, as an impeachment of his credit: And inasmuch as the said several matters hereinbefore mentioned do not appear by the record, &c. (*as in the last.*)

APPENDIX.—No. II.

Affidavit to put off trial on account of absence of material witness.
(Tidd's Forms, 310.*)*

In the King's Bench, &c. | *A. B.* plaintiff,
and
C. D. defendant.

C. D. of ——, the defendant in this cause, maketh oath and saith, that issue was joined in this cause, in —— term last past, and that notice was given for the trial thereof at the —— sitting within (*or*, at the sittings after) the said term: And this deponent further saith, that *E. F.* late of —— is a material witness for him this deponent in the said cause, as he is advised and believes, and that he cannot safely proceed to the trial thereof, without the testimony of him the said *E. F.* And this deponent further saith, that in consequence of the notice of trial so given as aforesaid, he this deponent caused inquiry to be made, &c. (*stating the nature and result of the inquiry made after the witness, and the time when he is likely to attend.*)

Sworn, &c. *C. D.*

APPENDIX.—No. III.

STAT. 1 WILL. IV. c. 22.

An act to enable Courts of Law to order the Examination of Witnesses upon Interrogatories and otherwise.

WHEREAS great difficulties and delays are often experienced, and sometimes a failure of justice takes place, in actions depending in courts of law, by reason of the want of a competent power and authority in the said courts to order and enforce the examination of witnesses, when the same may be required, before the trial of a cause: And whereas, by an act passed in the thirteenth year of the reign of his late Majesty King George the Third, intituled, *An Act for the establishing certain Regulations for the better Management of the Affairs of the East India Company, as well in India as in Europe*, certain powers are given and provisions made for the examination of witnesses in India in the cases therein mentioned; and it is expedient to extend such powers and provisions: Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that all and every the powers, authorities, provisions, and matters contained in the said recited act relating to the examination of witnesses in India, shall be and the same are hereby extended to all colonies, islands, plantations, and places, under the dominion of his Majesty in foreign parts, and to the judges of the several courts therein, and to all actions depending in any of his Majesty's courts of law at Westminster, in what place or country soever the cause of action may have arisen, and whether the same may have arisen within the jurisdiction of the court to the judges whereof the writ or commission may be directed, or elsewhere, when it shall appear that the examination of witnesses under a writ or commission issued in pursuance of the authority hereby given will be necessary or conducive to the due administration of justice in the matter wherein such writ shall be applied for.

II. And be it further enacted, that when any writ or commission shall issue under the authority of the said recited act, or of the power hereinbefore given by this act, the judge or judges to whom the same shall be directed shall have the like power to compel and enforce the attendance and examination of

witnesses as the court whereof they are judges does or may possess for that purpose in suits or causes depending in such court.

III. And be it further enacted, that the costs of every writ or commission to be issued under the authority of the said recited act, or of the power hereinbefore given by this act, in any action at law depending in either of the said courts at Westminster, and of the proceedings thereon, shall be in the discretion of the court issuing the same.

IV. And be it further enacted, that it shall be lawful to and for each of the said courts at Westminster, and also the court of common pleas of the county palatine of Lancaster, and the court of pleas of the county palatine of Durham, and the several judges thereof, in every action depending in such court, upon the application of any of the parties to such suit, to order the examination on oath, upon interrogatories or otherwise, before the master or prothonotary of the said court, or other person or persons to be named in such order, of any witnesses within the jurisdiction of the court where the action shall be depending, or to order a commission to issue for the examination of witnesses on oath at any place or places out of such jurisdiction, by interrogatories or otherwise, and by the same or any subsequent order or orders to give all such directions touching the time, place, and manner of such examination, as well within the jurisdiction of the court wherein the action shall be depending as without, and all other matters and circumstances connected with such examinations, as may appear reasonable and just.

V. And be it further enacted, that when any rule or order shall be made for the examination of witnesses within the jurisdiction of the court wherein the action shall be depending, by authority of this act, it shall be lawful for the court, or any judge thereof, in and by the first rule or order to be made in the matter, or any subsequent rule or order, to command the attendance of any person to be named in such rule or order for the purpose of being examined, or the production of any writings or other documents to be mentioned in such rule or order, and to direct the attendance of any such person to be at his own place of abode, or elsewhere, if necessary or convenient so to do; and the wilful disobedience of any such rule or order shall be deemed a contempt of court, and proceedings may be thereupon had by attachment (the judge's order being made a rule of court before or at the time of the application for an attachment), if, in addition to the service of the rule or order, an appointment of the time and place of attendance in obedience thereto, signed by the person or persons appointed to take the examination, or by one or more of such persons, shall be also served together with or after the service of such rule or order: Provided always, that every

person whose attendance shall be so required shall be entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial: Provided also, that no person shall be compelled to produce, under any such rule or order, any writing or other document that he would not be compellable to produce at a trial of the cause.

VI. And be it further enacted, that it shall be lawful for any sheriff, gaoler, or other officer having the custody of any prisoner, to take such prisoner for examination under the authority of this act, by virtue of a writ of *habeas corpus* to be issued for that purpose; which writ shall and may be issued by any court or judge under such circumstances and in such manner as such court or judge may now by law issue the writ commonly called a writ of *habeas corpus ad testificandum*.

VII. And be it further enacted, that it shall be lawful for all and every person authorised to take the examination of witnesses by any rule, order, writ, or commission made or issued in pursuance of this act, and he and they are hereby authorised and required to take all such examinations upon the oath of the witnesses, or affirmation in cases where affirmation is allowed by law instead of oath, to be administered by the person so authorised, or by any judge of the court wherein the action shall be depending; and if upon such oath or affirmation any person making the same shall wilfully and corruptly give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury, and shall and may be indicted and prosecuted for such offence in the county wherein such evidence shall be given, or in the county of Middlesex if the evidence be given out of England.

VIII. And be it further enacted, that it shall and may be lawful for the master, prothonotary, or any other persons to be named in any such rule or order as aforesaid for taking any examination in pursuance thereof, and he and they are hereby required to make, if need be, a special report to the court touching such examination, and the conduct or absence of any witness or other person thereon or relating thereto; and the court is hereby authorised to institute such proceedings and make such order and orders upon such report, as justice may require, and as may be instituted and made in any case of contempt of the court.

IX. And be it further enacted, that the costs of every rule or order to be made for the examination of witnesses under any commission or otherwise by virtue of this act, and of the proceedings thereupon, shall (except in the case hereinbefore provided for) be costs in the cause, unless otherwise directed either by the judge making such rule or order, or by the judge before whom the cause may be tried, or by the court.

X. And be it further enacted, that no examination or deposition to be taken by virtue of this act shall be read in

evidence at any trial without the consent of the party against whom the same may be offered, unless it shall appear to the satisfaction of the judge that the examinant or deponent is beyond the jurisdiction of the court, or dead, or unable from permanent sickness or other permanent infirmity to attend the trial; in all or any of which cases the examinations and depositions certified under the hand of the commissioners, master, prothonotary, or other person taking the same, shall and may, without proof of the signature to such certificate, be received and read in evidence, saving all just exceptions.

XI. Provided always, and be it further enacted, that no order shall be made in pursuance of this act by a single judge of the court of pleas of the said county palatine of Durham, who shall not also be a judge of one of the said courts at Westminster.

ADDENDA.

P. 433.—*Law of inheritance—stat. 3 and 4 W. 4, c. 106.*]

1. The first section is explanatory of the meaning of words in the act.
2. In every case descent shall be traced from the purchaser, and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require, the person last intitled to the land shall be considered to have been the purchaser, unless it be proved that he inherited the same; and in like manner the last person from whom the land shall be proved to have been inherited shall be considered to have been the purchaser, unless it be proved that he inherited the same.
3. When any land shall have been devised by any testator who shall die after the 31st December 1833 to the heir or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as devisee and not by descent: and when any land shall have been limited by any assurance executed after the said 31st Dec. 1833, to the person or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser, by virtue of such assurance, and shall not be considered to be intitled thereto as his former estate, or part thereof.
4. When a person shall have acquired land by purchase under a limitation to the heirs or to the heirs of the body of any of his ancestors contained in any assurance executed after the said 31st Dec. 1833, or under a limitation to the heirs or to the heirs of the body of any of his ancestors, or under any limitation having the same effect contained in a will of any testator who shall die after the said 31st Dec. 1833, then such land shall descend, and the descent shall be traced, as if the ancestor named in such limitation had been the purchaser of the land.
5. No brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall be traced through the parent.
6. Every lineal ancestor shall be capable of being heir to any of his issue, and where there shall be no issue of the purchaser his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal an-

cestor, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue other than a nearer lineal ancestor or his issue.

7. None of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants shall have failed; and no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed; and no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed.
8. Where there shall be a failure of male paternal ancestors of the person from whom descent is to be traced and their descendants, the mother of his more remote male paternal ancestor or her descendants, shall be the heir or heirs of such person in preference to the mother of a less remote male paternal ancestor or her descendants, and where there shall be a failure of male paternal ancestors of such person and their descendants, the mother of his more remote male maternal ancestor and her descendants shall be the heir or heirs of such person in preferenee to the mother of a less remote male maternal ancestor and her descendants.
9. Any person related to the person from whom the descent is to be traced by the half blood, shall be capable of being his heir; and the place in which any such relation by the half blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be next after any relation in the same degree of the whole blood and his issue, where the common ancestor shall be a male, and next after the common ancestor where such common ancestor shall be a female, so that the brother of the half blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother, shall inherit next after the mother.
10. When the person from whom the descent of any land is to be traced, shall have had any relation who, having been attainted, shall have died before such descent shall have taken place, then such attainder shall not prevent any person from inheriting such land, who would have been capable of inheriting the same, by tracing his descent through such relation if he had not been attainted, unless such land shall have escheated, in consequence of such attainder before the 1st January, 1834.
11. Provides that the act shall not extend to any descent before January, 1834.
12. Limitations made before the 1st January, 1834, to the heirs

of a person then living, shall take effect, as if this act had not been made.

P. 32.—*Hearsay—declarations of persons having no interest to misrepresent.*] An entry of the dishonor of a bill of exchange made at the time of dishonor in the usual course of business, by a clerk of a notary (in his book), who presented the bill, is admissible in an action on the bill on proof of the death of the clerk. *Poole v. Dicas*, 1 *Bingh. N.C.* 649.

P. 132.—*Effect of evidence—decrees in Chancery.*] On a trial touching the right to lands, decrees in chancery between other parties concerning the same lands, have been held admissible to show the character in which the possessor enjoyed the lands. *Davies v. Lowndes*, 1 *Bingh. N. C.* 606.

P. 134.—*Effect of inquisitions—Nonæ rolls.*] In the reign of Edward 3, by stat. 14 Ed. 3, stat. 1, c. 20, and by another statute in the same year, a grant was made to the king of the ninth lamb, the ninth of corn, &c., upon which certain commissions issued to value the ninth, according to the value upon which churches were taxed (Pope Nicholas's *valor* and taxation) if the value of the ninth amounted to so much as the tax, and to levy more where the value of the amount should exceed the tax, but if less, the true value of the ninth, and to gain correct information of these facts, they were authorised to take inquisitions upon the oath of the parishioners. These inquisitions being returned, were entered upon rolls called the *Nonæ rolls*, which are now evidence, the inquisitions themselves being in most cases lost. The inquisitions themselves are said to contain many things omitted from the rolls, on which the sum total only is inserted, while the inquisitions contain the minute items of the account. See the *Gent.'s Mag.* vol. iii. p. 135, N. S. for a particular account of these and other ancient records.

P. 284.—*Money paid. Exall v. Partridge.*] It seems that in these cases, in order to support a count for money paid, the defendant must be either *primarily liable* to pay the money sought to be recovered from him, or there must be an *express request* on his part to pay the money. See *Spencer v. Parry*, 4 *Nev. and M.* 774.

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LONDON:
PRINTED BY RAYNER AND HODGES,
Shoe Lane, Fleet Street.